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REPORTS

OF

513-

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

June Term, 1866, January and June Terms, 1867.

BY JOHN W. SHEPHERD,
STATE REPORTER.

VOL. XL.

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OFFICERS OF THE SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

A. J. WALKER, CHIEF JUSTICE.

WM. M. BYRD,
THOS. J. JUDGE, } ASSOCIATE JUSTICES.

JNO. W. A. SANFORD, ATTORNEY-GENERAL.

JNO. D. PHELAN, CLERK.

HENRY L. TAYLOR, MARSHAL.

ERRATA.

The first head-note to the case of *Pollard, Ex parte*, (p. 77,) is not correctly printed, an important part of the sentence being omitted. The mistake is corrected in the index, tit. CONSTITUTIONAL LAW, 1.

There is an apparent omission of pages 281-284, which was caused by a mistake in the folios.

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REPORTS
OF
CASES ARGUED AND DETERMINED
AT THE JUNE TERM, 1866.

FRANK (A FREEDMAN) *vs.* THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. *Construction of bill of exceptions.*—A recital in the bill of exceptions, in a criminal case, that “the refusal of the court to give the charge asked, and the conviction and sentence, *are assigned as error*”, is equivalent to an exception to the conviction and sentence.
2. *Proof of venue.*—In a criminal case, if the bill of exceptions purports to set out all the evidence, and does not show that the venue was proved; and an exception was reserved to the conviction and sentence, though no specific charge was given or asked in reference to the proof of venue,—the judgment will be reversed on error on account of the defect in the evidence. (WALKER, C. J., *dissenting.*)

FROM the Circuit Court of Barbour.

Tried before the Hon. J. McCaleb Wiley.

THE indictment in this case, which was found on the 9th November, 1865, charged “that Frank, *alias* Big Frank, a freedman, unlawfully, and with malice aforethought, assaulted W. C. Jordan, with the intent to murder him.” The prisoner pleaded not guilty, and was tried at the May term, 1866, when he reserved the following bill of exceptions:

“On the trial, the State proved by W. C. Jordan, who was the prosecutor, that he was the owner of the prisoner, who was a slave, up to the time of his emancipation; and that on the morning of the 28th August, 1865, the prisoner

Frank (a freedman) v. The State.

inflicted on him a wound with a knife, under the following circumstances: Witness went up to the prisoner, or passed by him, a little before sunrise, and told him to 'go on to the brick-yard, as he wanted a good day's work done there'; or words to that effect. The prisoner was standing in the yard, in front of his cabin, cutting a piece of old cloth with a knife, and said that he was making an apron to work in at the brick-yard; and he appeared somewhat sullen. Witness then left him, but returned in about fifteen minutes, and found him in the same place, still cutting the piece of old cloth. Witness then addressed him, somewhat angrily, in these words: 'Frank, why don't you go?' and asked him if all the rest had not gone. The prisoner replied, rather sullenly, 'I don't know whether they are or not.' Witness was at that time some little distance from the prisoner, on the other side of the fence; and he immediately crossed the fence, walked up to the prisoner, and said, 'If you don't go, I'll see if I can't make you go'; and catching up a paling, about four feet long, which was lying on a scaffold hard by, he struck the prisoner with it about the shoulders. The prisoner, with his right hand, instantly seized witness' left arm, and, with the knife (which was an old shoe-knife) in his left hand, stabbed him one blow under the right arm, and immediately sprang away and left. Witness merely said, 'You, Frank,' when the prisoner seized his arm. The prisoner said nothing. The wound with the knife followed immediately after the blow with the paling; but the prisoner had not done or said anything evincing a purpose to stab, until he was struck. The State also introduced as a witness Dr. W. G. Drake, a practicing physician, who testified, that he was called to examine the wound; that it was under the right arm, and over the region of the right lung; that the instrument with which the wound was given struck a rib, and did not penetrate the cavity; that he did not examine to ascertain if there was an incision on the rib; and that the wound might have been fatal, if the instrument had penetrated the cavity. The State also proved that, on the same day, the prisoner was seen at Union Springs, some eleven or twelve miles from home. This was all the evidence on the part of the State,

and the prisoner had no witnesses. The prisoner asked the court to charge the jury, that if they believed, from the evidence, that the offense with which he was charged was committed on the 28th August, 1865, then he could not be convicted under the indictment, and they must find him not guilty; which was refused, and the defendant excepted. The prisoner was tried under section 3106 of the Code, and sentenced to the penitentiary for five years. The refusal of the court to give the charge asked, and the conviction and sentence, are assigned as error; and the defendant tenders this, his bill of exceptions, praying that the same may be signed," &c.

CHILTON & THORINGTON, for the prisoner.

JOHN W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—The record purports to set out all the evidence introduced on the trial, and it shows that the prisoner offered none. Upon a demurrer to the evidence, and a joinder therein, the court should have given judgment for the prisoner; or, if a charge had been asked, that the prisoner could not be found guilty upon the evidence, the court should have given it. In the first case, no exception was necessary, in order for this court to revise the ruling of the court, if the demurrer had been overruled; in the latter, it may have been necessary that an exception should have been taken, if the charge had been refused, in order for this court to revise the refusal of the court to give the charge.

The prisoner, in his bill of exceptions, "assigns as error" the refusal of the court to give a charge asked, and also "the conviction and sentence". This must be taken as equivalent to an exception to the conviction and sentence. *Sackett & Shelton v. McCord*, 23 Ala. R. 851. By section 3663 of the Code, it is provided that, in criminal cases, this court must render such judgment as the law demands; and by this may be understood such judgment as the law demanded the court below to render. By section 3650, it is provided that, "if such question" (that is, a question of law) "does not distinctly appear on the record, it must be

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reserved by an exception, taken and signed by the judge as in civil cases"; which, impliedly at least, gives the right to the prisoner to have any error which distinctly appears on the record revised by this court. The bill of exceptions is a part of the record; and, so much so, it has been held by this court, that if it is inconsistent with the judgment-entry, it must control.—4 Ala. 516; 9 Ala. 430; *The State v. Jones*, 5 Ala. 666; *Vincent v. Rogers*, 30 Ala. 471.

[2.] The proof in this case does not show that the offense was committed within the jurisdiction of the county of Barbour, nor is it so averred in the indictment. The constitution (art. 1, § 10) secures to the prisoner, "in all prosecutions by indictment or information, a speedy public trial by an impartial jury of the county or district in which the offense shall have been committed"; and this provision was in force when this offense, if committed, is shown by the evidence to have been committed. The Code (§ 3514) dispenses with an averment of *venue* in the indictment, but requires, in its stead, that "the proof must show it to have been within the jurisdiction of the county in which the indictment is preferred."

At common law, *venue* was matter of substance, and must be averred; and if omitted, the judgment was reviewable on error, although no objection was made in the court below.—1 Archb. Crim. Pl. (Waterman's Notes,) p. 64, note 1; 2 Hale, 180; Hawk. Pl. Cr. b. 2, c. 25, § 34.

It therefore becomes a very grave question, whether, in a case where all the evidence is set out, the record must show affirmatively that the *venue* was proven on the trial, not only to give jurisdiction to the court, but to authorize the jury to find a verdict of guilty.—*Noles v. The State*, 24 Ala. 692. Where all the evidence is not set out in the record, we might presume that it was shown on the trial that the offense was committed in the county where "the indictment is preferred."

In the case of *Noles v. The State*, (*supra*,) the court say, "But the particulars, as to the time, place, and circumstance, not constituting essential elements of the crime, may be dispensed with in the indictment, by statute, and be left as matter of proof, as establishing or not the juris-

diction of the court." *Venue*, then, seems to be matter, not an essential ingredient of the crime, but *essential* to establish the jurisdiction of the court. Now, when the record sets out all the evidence, and does not show that the offense was committed in the county where the indictment is preferred, and, therefore, not within the jurisdiction of the circuit court of that county, is the judgment and sentence reversible for want of jurisdiction in the court? At common law, it certainly would have been reversible error, if the indictment had not alleged the venue; and as the statute has required this jurisdictional fact to be shown by the proof, it would seem, on principle, that the total absence of such proof, where all the evidence is set out, would be fatal to the jurisdiction of the court, and, consequently, to the conviction and sentence.

This court will not reverse for a defect of evidence to sustain the verdict, unless the question is raised on demurrer to the evidence, or in some other appropriate manner; but must reverse, whenever the record fails to show that the court had jurisdiction of the cause. It is the duty of this court, *mero motu*, to arrest a cause, and reverse the judgment, whenever it does not appear that the court below had jurisdiction; and it does not so affirmatively appear on the record in this cause.—*Commissioners' Court v. Thompson*, 18 Ala. 694; *Long v. Commissioners' Court*, 18 Ala. 482; *Wilson v. Judge Pike Co. Ct.*, 18 Ala. 757; *Wightman v. Karsner*, 20 Ala. 446; *Lamar v. Commissioners' Court*, 21 Ala. 772; *Molett v. Kenan*, 22 Ala. 484; 25 Ala. 480; 26 Ala. 568; *Owen v. Jordan*, 27 Ala. 608; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510; *ib.* 391, 663; 26 Ala. 247; 17 Ala. 430; 19 Ala. 171; 20 Ala. 387; 23 Ala. 155; *Wyatt v. Judge*, 7 Porter, 37.

It is true, that if a court has jurisdiction of the subject-matter, although some fact necessary to give jurisdiction of the particular cause may not be shown by the record, its judgment cannot be attacked collaterally; but it can always be attacked by a direct proceeding, or on appeal, unless the party has waived such matter of fact. But, in criminal causes, such waiver is not to be inferred from the failure of the party to raise the question in the court be-

low. When it is necessary to show the fact to give jurisdiction, it can only be waived, if at all, by some act which amounts to an express waiver; and where the prisoner excepts to the conviction and sentence of the court on the indictment, after setting out all the evidence in a bill of exceptions, it is neither an express nor an implied waiver of the matter which should have been proved to give jurisdiction, in such a case as this.

The court, in the case of *Noles v. The State*, (*supra*,) went as far as we are disposed to go, in holding that the statute which dispensed with the averment of *venue* in an indictment, did not conflict with the constitution of the State, *which*, in effect, secures to an offender a trial by jury, and on an indictment; and this jury and indictment must be, in substance, at least, such as was authorized by the common law. In the case of *Noles v. The State*, the court seem to have held the indictment good, because the Code (§ 3514) required proof of *venue* to show that the offense was "within the jurisdiction of the county in which the indictment was preferred"; and that, therefore, the prisoner was not deprived of a right secured by the common law and the constitution. The language of the Code is imperative, as to the proof of *venue*, and so it seems to have been considered by the court in the case of *Noles*, *supra*.

We hold, therefore, that whenever the indictment is in the form prescribed by the Code, and the bill of exceptions sets out all the evidence, and it does not affirmatively appear that the offense was committed in the county where the indictment is preferred, and the prisoner excepts to the conviction and sentence of the court, there is error, distinctly appearing on the record, fatal to the conviction and sentence, on appeal.

No case has been found on record like this, for the reason, we suppose, that no State has ever enacted such a statute as section 3514 of the Code. We do not hold that the verdict of the jury can be reversed, on such a bill of exceptions as this; but we hold that, the record setting out all the evidence, and failing to show that the court had jurisdiction of the cause, as required by section 3514 of the Code, the judgment of the court below must be reversed, and the cause remanded; and so let it be entered.

A. J. WALKER, C. J.—The bill of exceptions professes to set out all the evidence. It is silent upon the subject of proof of venue. It is therefore to be inferred, that the venue was not proved. There was no objection in the court below on account of the absence of proof of venue; no charge given, to which objection was made; and no charge asked, which raised the point of the want of such proof. The question thus arises, whether we can reverse the judgment, because there appears to have been no proof of venue, when the omission was not made the subject of objection in the court below. I think this question should be decided in the negative.

At common law, in criminal cases, only those errors which were apparent on the record, were cognizable in the revising tribunal. No bill of exceptions, for the presentation of questions arising on the trial, could be taken, either in misdemeanors or felonies. The English statute (13 Edw. 1, ch. 31) on the subject of bills of exceptions is confined to civil cases; and no revision of points arising on the trial of a criminal cause can, even at this day, be had in England, unless under some late statute, which I have not discovered.—*Regina v. Alleyne*, 29 Eng. Law & Eq. 179; 2 Bacon's Abr., *Bill of Exceptions*, 112, 114; *Ned v. State*, 7 Porter, 187; *Bourne v. State*, 8 Porter, 458; *State v. Jones*, 5 Ala. 666.

As bills of exceptions were unknown at the common law, this court only has such power to revise the proceedings on the trial of a criminal cause as is given by statute. The authority given is set forth as follows in the Code: "§ 3649. Any *question of law*, arising in any of the proceedings on an indictment, may be *reserved* by the defendants, but not by the State, for the consideration of the supreme court." "§ 3650. If *such question* does not distinctly appear on the record, *it must be reserved by an exception*, taken and signed by the judge as in civil cases." "§ 3651. When any *question of law*, in a criminal case, is *reserved* for the determination of the supreme court, the clerk of the court must make out a complete transcript of the record, attach his certificate thereto, and transmit it to the clerk of the supreme court, by the first day of the term

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next after judgment." "§ 3652. When any *question of law* is *reserved*, the presiding judge must render judgment on the conviction; but the execution of the judgment must be suspended," &c.

These sections of the Code constitute the warrant to this court for a reversal, in criminal cases, for matters transpiring on the trial, and not regularly belonging to the record. This warrant, the legislature, under its constitutional authority to restrict and regulate the jurisdiction of this court, has prescribed. The sections quoted bestow a privilege, which before did not exist, upon persons charged by indictment; and, in doing so, innovate upon the common law. This privilege admeasures the authority of this court to revise. The privilege, as very distinctly declared, is to *reserve questions of law by exception which arise in the proceedings*. The privilege has this extent, and no more, unless, in violation of an established principle, an addition is made to a statute which is in derogation of the common law. In the language of this court, in *Palmer v. Bice*, (28 Ala. 430,) "as the right is the creature of the statute, its extent must be determined by the statute."

The question that no proof of venue was made in this case, was not reserved by exception; and it is a question of fact, and not of law. Whether the venue was proved, was a question of fact, determinable by observation; and not a question of law, addressed to, and determinable by the legal judgment. It was a question for the jury, under the guidance of proper instructions, and not a question for the court. No objection to a conviction, in the absence of such proof, was made; no charge was asked; and the attention of the court was not called to the point.

It may be said, that the rule which would exclude the consideration of the point in this case, is tolerable in civil, but not in criminal cases. The reply is, that the law has made no distinction, and this court has no legislative authority. But the law has not only made no distinction between civil and criminal cases, as to the revision of questions presented by bill of exceptions, but it has directed that the point "must be reserved by an exception, taken and signed by the judge as in civil cases." Neither this,

nor any other court, as far as I am informed, has ever made any distinction, affecting this question, between civil and criminal cases. In the case of *Skinner v. State*, (30 Ala. 524,) there was a conviction upon the uncorroborated evidence of an accomplice, which was expressly prohibited by statute. That the conviction was upon such evidence, appeared beyond dispute from the bill of exceptions. This court, RICE, C. J., delivering the opinion, held, that the judgment could not be reversed, because the question of the sufficiency of the evidence was not reserved in the court below by an exception. In the case of *Johnson v. State*, (29 Ala. 62,) the bill of exceptions disclosed the fact, that the court below had overruled a motion of the defendant that the solicitor should be required to select on which one of several counts he would proceed. It was decided, the same judge delivering the opinion, that the ruling of the circuit court could not be revised, because no objection or exception was made or taken to it; and the decision was made on the authority of *Gager v. Gordon*, (29 Ala. 341,) a civil case. Of the many decisions in civil causes by this court, denying the right of revision where there was no exception, I cite the following: *Palmer v. Bice*, *supra*; *Knapp v. McBride & Norman*, 7 Ala. 19; *Simmons v. Varnum*, 36 Ala. 92; *Taylor v. McElrath*, 35 Ala. 330; *Smith v. King*, 22 Ala. 559; *Bradley v. Andress*, 30 Ala. 80; *Williams v. Gunter*, 28 Ala. 681; *Gordon v. McLeod*, 20 Ala. 242; *Reese v. Gresham*, 29 Ala. 91; *Mahoney v. O'Leary*, 34 Ala. 97; *Vincent v. Rogers*, 30 Ala. 474; *Chamberlain v. Masterson*, 29 Ala. 299.

The language of the statute construed in the case of *Palmer v. Bice*, (*supra*), was, that "the facts, point, or decision, may be reserved for the decision of the supreme court, by bill of exceptions, as in other cases." This language was held to preclude the authority of revision over any question not presented by exception; and the emphatic remark was made, that "as the right (of revision) is the creature of the statute, its extent must be determined by the statute." That remark is as apposite here, as in the case in which it was made. The right of revision is given

alone by the statute, and it can not exceed the bounds prescribed by the statute.

The rule is, that the matter to be revised must be excepted to below ; and there is no exception, where the entire evidence is set out.—2 Bacon's Abr., *Bill of Exceptions*, 114.

The decisions in other States fully sustain the argument of this opinion.—*State v. Jenkins*, 5 Jones' Law, 19 ; *Keithler v. State of Miss.*, 10 Sm. & M. 192 ; *People v. Stockham*, 1 Park. C. R. 424 ; *Wash v. State*, 14 Sm. & M. 120 ; *Walton v. United States*, 9. Wheaton, 657 ; *Sheppard v. Wilson*, 6 How. 275 ; *Haynie v. State*, 32 Miss. 400.

The rule which requires a party to except to an adverse ruling of the court, is reasonable, and conservative of justice. If an exception is made, the court may correct its error ; and it is waived by a failure to except.—*Chamberlain v. Masterson*, 29 Ala. 299. In *Wright v. Sharp*, (1 Salk. 288,) it was said : " You should have insisted upon your exception at the trial. You waive it, if you acquiesce, and shall not resort back to your exception after a verdict against you."

It may be objected to this argument, that the proof of venue must be made, in order to show the jurisdiction of the court, and that an exception must be dispensed with, when the question is jurisdictional. The answer to this suggestion is, that it is always necessary to prove the jurisdiction of the case to the jury ; and that it is for the jury to determine, whether the fact, upon which the jurisdiction of the case depends, is established ; and that there is no reason why the defendant should not be required to except, in reference to any absence or deficiency of proof on this point, as well as on any other. The question of jurisdiction over the subject-matter can never come before the jury. That is given by the constitution, and laws passed in pursuance of it. The venue is a question only as to the jurisdiction of the case in reference to the locality of the court. This question is one to be determined upon the evidence, by the jury. If it were a question of jurisdiction over the subject-matter, there could be no change of venue, for consent can not give such jurisdiction.

The remark in *Noles v. State*, (24 Ala. 672,) that the venue

Frank (a freedman) v. The State.

“may be left as matter of proof, as establishing or not the jurisdiction of the court,” could not have been designed to assert a dependence of the jurisdiction over the subject-matter upon the proof of venue to the jury. The constitutional guaranty of a “speedy public trial by an impartial jury of the county or district in which the offense” was committed, is no qualification of the general jurisdiction over all criminal matters, bestowed by another clause upon the circuit court. It relates to the cases of which the courts of the respective counties are to take cognizance. The statute makes a kindred regulation in chancery suits. The rule that the case must be tried in a particular county, may be waived by the defendant; and it is actually suspended in his favor, in changes of venue. Here, the question is, not whether he may waive a trial in the prescribed county, but whether he can waive or dispense with proof that the offense was committed in the county. I entertain no doubt that he can, as the authorities conclusively demonstrate.

The opinion in the case of *McCauley v. The State*, (26 Ala. 135,) held, that the constitution secured a right to a continuance of the deliberations of the jury, in a criminal case, until the occurrence of a sufficient legal reason for its discharge; but that this right could be waived by the prisoner's consent to the discharge of the jury. *Bramlett v. State*, (31 Ala. 376,) was tried after a change of venue; and after the trial, a motion in arrest of judgment was made, on the ground that the transcript from the court where the indictment was found did not show the organization of the grand jury. RICE, C. J., the other judges delivering no opinion upon the point, held, upon authorities which fully sustained him, that the prisoner, by a failure to object until after the verdict, waived the right to have affirmative evidence in the transcript of the organization of the grand jury. *Paris v. State*, (36 Ala. 232,) maintained the well-established doctrine, that a defendant, who has been arraigned and pleaded not guilty, without objection to the preliminary proceedings, waives all right of exception to them. In *Rosenbaum v. State*, (33 Ala. 354,) it was decided, that the accused, in a criminal cause, could waive his constitutional right to be

confronted by the witnesses. The opinion deciding the case of *Hughes v. The State*, (35 Ala. 351,) goes fully into the question of the power of one indicted to waive his constitutional rights, and attains the conclusion that the prisoner may consent to a mistrial, because the constitutional immunity against a second trial is for his benefit, and he may waive it; and that all the constitutional guaranties to defendants in criminal cases may be waived, with the exception of those which affect the very nature of the tribunal appointed for the trial of the case. In *Doty v. State*, (6 Ind. 529,) the supreme court of Indiana, upon a constitutional provision and a statute as to venue like ours, decided, where the record showed no change of venue, and where the trial was had in a county different from that in which the offense was committed, that in the absence of an objection in the court below, a change of venue would be presumed, and that the question was the same as in a civil case.—*Basly v. Farquar*, 2 Blackf. 71; 2 Revised Statutes of Indiana, 370, § 376; Constitution of Indiana, art. 1, § 13.

Upon the arguments and authorities which [I have adduced, I think I have maintained the following propositions: 1st, that there is no right, either in a criminal, or in a civil case, to revise a matter presented only by bill of exceptions, which was not objected to in the court below; 2d, that this court can only revise questions of law, in such a case as this; 3d, that it is competent for the accused to waive the proof of venue; and, 4th, that such proof is waived by a failure to raise the point in the court below. In my judgment, (and I say it with the utmost respect for my brethren,) the decision of the majority of the court is without precedent, and unsustained by any correct principle, and initiates a doctrine which I think ought to be resisted at the outset. The ruling of the court allows a party to take advantage of an omission which may have been the result of mere inadvertence, and which could have been easily supplied, or to avail himself of a deficiency in the bill of exceptions, which was probably the result of carelessness incident to the haste with which it was prepared.

TURNER vs. THE STATE.

[INDICTMENT FOR AIDING IN CONCEALMENT OF STOLEN PROPERTY.]

1. *Demurrer to indictment containing good and bad counts.*—The sustaining of a demurrer to a bad count in an indictment, does not affect the remaining good counts, nor relieve the defendant from liability under them.
2. *Concealing or receiving stolen property; punishment of.*—For concealing, or aiding to conceal, a stolen horse, or other animal specified in section 3182 of the Code, knowing it to have been stolen, a conviction may be had under section 3178; but, for buying or receiving such stolen animal, knowing it to have been stolen, a conviction can only be had under section 3182.
3. *Same.*—The act approved October 7, 1864, which punished horse-stealing, and other offenses therein specified, with death, or ten years' imprisonment in the penitentiary, (Session Acts, 1864, p. 19,) did not repeal section 3178 of the Code, nor affect prosecutions under it.
4. *Same.*—Under section 3178 of the Code, and the act amendatory thereof, approved January 23, 1866, (Session Acts, 1855-6, p. 121,) the punishment for concealing, or aiding in the concealment of stolen property, is imprisonment in the penitentiary, "or fine and imprisonment, one or both, at the discretion of the jury"; but, if the jury impose imprisonment as the punishment, or fine and imprisonment, it is the duty of the court to prescribe the period of the imprisonment. (BYRD, J., *dissenting*, held that the said act of January 23, 1866, was meaningless and void.)
5. *Same; verdict.*—To sustain a conviction under section 3178 of the Code, as amended by the said act approved January 23, 1866, the jury must, by their verdict, determine what the punishment shall be.
6. *Ex-post-facto laws.*—A law which simply provides another alternative punishment for an offense, which is in mitigation of the punishment prescribed by the former law, is not, in its operation on offenses already committed, violative of the constitutional provision against *ex-post-facto* laws.
7. *Second trial after reversal of former conviction.*—Where a judgment of conviction in a criminal case is reversed, on error or appeal, at the instance of the prisoner, he may be tried again; even where the reversal is on account of the insufficiency of the verdict.

FROM the Circuit Court of Tuscaloosa.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case was found at the special November term, 1865, and contained two counts; the first

charging, that the prisoner "did aid in the concealment of a mare, the property of Hale, Murdock & Co., knowing that the said mare was feloniously stolen, taken, and carried away"; and the second, that the mare was "the property of Harrison Hale, Abram Murdock, John M. Morgan, and James M. Wesson, a firm known as Hale, Murdock & Co." The prisoner demurred, "in short by consent," to the whole indictment, and to each count separately. The court sustained the demurrer to the first count, and overruled it as to the second; and the prisoner then went to trial on the plea of not guilty. "On the trial," as the bill of exceptions states, "the prisoner asked the court to charge the jury, that he could not be convicted of the offense charged, under the indictment in this case; which charge the court refused to give, and the prisoner excepted." The verdict of the jury was, "We, the jury, find the defendant guilty, in manner and form as charged in the bill of indictment"; and the court thereon sentenced him to three years' imprisonment in the penitentiary.

E. W. PECK, and W. R. SMITH, for the prisoner.—1. If the case of *Rose v. The State*, (Minor, 28,) is still law, the whole indictment must fall.

2. Under the decision in the case of *Barber v. The State*, (34 Ala. 213,) the intent to injure or defraud ought to have been averred and found.

3. A conviction for the offense charged in this case can not be had under section 3178 of the Code. Section 3180 makes horse-stealing a distinct offense, different from other larcenies; and section 3182 provides for the accessorial offenses of buying or receiving. The other accessorial offenses of concealing and aiding in the concealment of such stolen property, whether omitted inadvertently or designedly, are plainly not provided for; and the courts can not supply the omission.

4. If the principal, before attainder, is pardoned, or his life otherwise saved, the accessory is discharged.—Coke's Institutes, part 3, p. 139. So, if the law which punishes the principal be repealed, the law which punishes the accessory is necessarily repealed with it. Therefore, the act

of October 7, 1864, which repealed section 3180 of the Code, effected a repeal of all accessorial sections, and left the offense in this case without statutory provision for its punishment.

5. If the conviction is sustained under section 3178 of the Code, then the verdict is wholly insufficient, because it does not prescribe the punishment, as required by the amendatory act approved January 23, 1866, which makes the jury the sole judges of the punishment.

6. If the indictment is good, and the verdict insufficient to support a conviction, the prisoner is entitled to be discharged.—*The King v. Boone*, 1 Leading Criminal Cases, 376, and cases there cited.

JNO. W. A. SANFORD, Attorney-General, *contra*.—1. For an offense created by statute, an indictment in the words of the statute is sufficient.—*Lodano v. The State*, 25 Ala. 64; *Smith v. The State*, 22 Ala. 54.

2. For aiding in the concealment of a stolen horse, knowing it to have been stolen, a conviction may be had under section 3178 of the Code.—*Barber v. The State*, 34 Ala. 213.

3. The remark in the case of *Barber v. The State*, (*supra*,) as to the intent to injure or defraud being found, is a mere *obiter dictum*. The "intent to injure or defraud," as those words are used in section 3178, plainly refer only to the taking of any deed or conveyance mentioned in section 3176, and not to any of the offenses specified in section 3178.

4. The act approved January 23, 1866, amendatory of section 3178, ameliorates the punishment of the offense, and, therefore, is not objectionable as an *ex-post-facto* law. *Calder v. Bull*, 3 Dallas, 391.

5. Under this law, the jury have the power to fine or imprison, or to impose both punishments; and if they fail to exercise that discretionary power, it then becomes the duty of the court to prescribe the punishment, within the limits specified in the law.

JUDGE, J.—1. The advantages of different statements, in distinct counts of an indictment, are very apparent, and the cautious pleader will always insert as many counts as

may be necessary to meet every possible contingency. This the law permits; and it is also well settled, that a general verdict of guilty, under an indictment containing both good and bad counts, will be referred to the good counts, and the judgment of conviction thereupon sustained. —*Shaw v. The State*, 18 Ala. 547; *Hudson v. The State*, 34 Ala. 253. If an indictment, then, should contain both good and bad counts, no sufficient reason can be perceived, why a demurrer may not be sustained to the bad, without affecting the good counts, or the prisoner's liability thereunder. A *motion to quash* being different from a *demurrer*, the result might be changed if the bad counts were quashed. —*Rose v. The State*, Minor, 28. But, it has been held in Tennessee, that a judge may, at his discretion, quash a defective count in an indictment, without quashing the entire indictment. *Jones v. The State*, 6 Humph. 435. Be this as it may, we hold that the court, in the case before us, did not err in overruling the demurrer to the second count of the indictment, and holding the prisoner to answer thereto, after the first count had been held bad on demurrer. —Wharton's Criminal Law, § 427, and authorities there cited. If such was not the law, there could be no such thing as separate demurrers to distinct counts of an indictment; but a demurrer to any one count, would be equivalent to a demurrer to the whole indictment.

2. A conviction may be had under section 3178 of the Code, for concealing, or aiding to conceal, a horse, mare, or other animal specified in section 3182, knowing the same to have been stolen, notwithstanding the latter section provides for the punishment of the offense of buying or receiving the same species of property, knowing the same to have been stolen. —*Barber v. The State*, 34 Ala. 213. But, in the opinion of the court in *Barber v. The State*, a remark was made, not necessary to the decision of any question involved in the cause, and to which we can not give our assent. The remark to which we allude, is *italicized* in the following quotation from the opinion: "It follows, that, for concealing, or aiding in the concealment of the different species of personal property enumerated in section 3182, known to have been stolen, a conviction may be had under

section 3178, *if the intention to injure or defraud be found, as provided by that section.*" To show the incorrectness of the remark italicized above, it is necessary to examine section 3178, in connection with section 3176. The latter section provides as follows: "Any person who takes, or destroys, any deed, or conveyance, of lands, or personal property, belonging to another, *with the intent to injure or defraud*, must, on conviction, be punished as if guilty of grand larceny." Section 3178 provides, that "any person who buys, receives, conceals, or aids in the concealment of, any personal property, or deed, conveyance, or other writing specified in section 3176, knowing such personal property to have been stolen, *or such deed, conveyance, or other writing to have been taken with the intention to injure or defraud*, must, on conviction, be imprisoned," &c. The reading of the two sections, we think, clearly shows, that in no prosecution under section 3178, is it necessary to be either *averred*, *proved*, or *found*, before a conviction can be had, that the offense charged was committed with the intention to injure or defraud. In a prosecution under this section, *relating to personal property* that had been stolen, it would be necessary to aver and prove that the act charged was committed, "*knowing the property to have been stolen*"; and in such prosecution, *relating to any writing specified in section 3176*, it would be necessary to aver and prove that the offense charged was committed, "*knowing the deed, conveyance or writing, to have been taken with the intention to injure or defraud.*" This erroneous remark corrected, we hold *Barber v. The State* to be a sound exposition of the law; and we have been the more particular in correcting it, because the remark is relied on as authority to defeat the prosecution in the case before us.

3. The act of the 7th of October, 1864, (Session Acts, p. 19,) provides for the punishment of horse-stealing with death, or ten years' imprisonment in the penitentiary. It is contended that this act not only repealed section 3180 of the Code, the prior law fixing the punishment of the same offense, but that it also repealed the accessorial section, 3178, under which the present indictment was found; and that, therefore, at the time of the commission of the al-

leged offense in this case, there was no statutory law for its punishment. It needs no argument to show the unsoundness of this position. The act of the 7th of October, 1864, did not leave the offense of horse-stealing without statutory law for its punishment; it only *changed the punishment of the offense*; and to hold that such change repealed the accessorial section, 3178, would be making an application of the doctrine of repeal by implication, that could not be sustained by either principle or authority.

4. The legislature, by an act approved January 23, 1866, (Acts 1865-6, p. 121,) amended the section of the Code under which the indictment was found, by adding, at the end of the section, the following words: "or by fine and imprisonment, one or both, at the discretion of the jury trying the same"; thus making the section read, in so far as it relates to the punishment, as follows: "must, on conviction, be imprisoned in the penitentiary, not less than two, or more than five years, or by fine and imprisonment, one or both, at the discretion of the jury trying the same." A very cursory reading is sufficient to show what was intended by the legislature in making this amendment; it was to provide *alternative punishments*, at the discretion of the jury; and by supplying the words, "*be punished*," after the word "*or*", where it first occurs in the amendment, so that it will read, "*or be punished*," &c., what is simply a verbal inaccuracy will be corrected. It is a cardinal rule in the construction of a statute, that effect is to be given, if possible, to every clause and section of it; and it is the duty of courts, as far as practicable, so to reconcile the different provisions as to make the whole act consistent and harmonious. If this becomes impossible, then we are to give effect to what was manifestly the intention of the legislature, though by so doing we may restrict the meaning or application of general words.—Sedg. Stat. and Con. Law, 238.

The Code provides, (§§ 3620, 3621, 3622,) that "where an indictable offense is punished by fine only, or by fine and imprisonment, the jury must assess the fine, unless it is otherwise provided"; that "the court, in all cases, must fix the imprisonment, unless the power is expressly con-

ferred on the jury"; and that "imprisonment in the penitentiary must in no case be inflicted by the court, unless the power is expressly given." Under these sections, construed in connection with section 3178, as amended, is it for the *court* or the *jury*, on a verdict of guilty, in a prosecution under the last-named section, to fix the punishment of imprisonment, if such punishment is prescribed? The proper construction of these sections forces us to the conclusion, that in every such case it is for the jury to *prescribe*, and the court to *fix* the period of, the imprisonment; *prescribing* and *fixing* the period of imprisonment being separate and distinct things. Under the clear and explicit language of section 3621, as we have seen, "the court, *in all cases*, must fix the imprisonment, *unless the power is expressly conferred on the jury*." Now, does section 3178, as amended, expressly confer on the jury the power to fix the imprisonment, either in the penitentiary, or in the county jail? Whatever may have been the intention of the legislature in the passage of the amendment, the answer must be that it does not; and such power not being expressly conferred, the conclusion attained, that the court must fix the period of imprisonment, is irresistible. And the soundness of this conclusion is not at all shaken by the words, "*at the discretion of the jury*", where they occur in the amendment. The discretion conferred by these words refers exclusively to the "fine and imprisonment, one or both", provided as an alternative punishment; and, if a fine be imposed, or, "*at the discretion of the jury*", a fine be imposed *and* imprisonment prescribed, in either event, section 3620 expressly limits the power of *the jury* to the assessment of the *fine*, while the succeeding section (3621) expressly confers upon *the court* the exclusive power to fix the period of *imprisonment*.

"Imprisonment in the penitentiary", or "fine and imprisonment, one or both, at the discretion of the jury", are *alternative* punishments, *both* presenting but a *single* choice. That choice rests exclusively with the jury: they may prescribe either the one or the other; so that, as to these alternatives, the jury, necessarily, have the same discretion that they have as to fine and imprisonment, one or both, if

that be the alternative adopted. It is clear, then, that the words, "at the discretion of the jury", in the amendment, do not militate against the conclusion attained as to this part of the case.

5. Under section 3178, as amended, the punishment to be inflicted on a verdict of guilty, is an essential ingredient of the verdict; and no sentence of punishment by the court is authorized, unless the verdict shows the punishment to be inflicted. In every such case, it is the right of the accused to have the question of his punishment considered and passed upon by the jury; and it cannot be known that this right has been accorded to him, unless the verdict shows it. This right is of no minor importance; for, if the question of punishment is considered, the milder or less rigorous may be imposed; and to sustain a verdict silent upon this question, would place the accused in a position powerless for redress, if the jury should, either from incompetency, negligence, or willful refusal, fail to accord to him this clear legal right. We cannot, to sustain the verdict in the case before us which is thus defective, make the intendment that the jury properly passed upon the question of punishment; such a conclusion would be at war with every just and benign principle on which our system of criminal law is founded, as it might result in *depriving the accused of a clear legal right by intendment, without fault or neglect, or even implied acquiescence, on his part.* We can never give our assent to the establishment of such a principle.

We think it a correct legal proposition, that the verdict alone can be looked to for the action of the jury as to all questions legitimately involved in, and necessary to be decided by it; and if the proper action upon all such questions is not affirmatively shown by the verdict, the legal presumption is, that the consideration of them was omitted by the jury. Let us apply this rule to the verdict in the case before us, which is in the following words: "We, the jury, find the defendant guilty, in manner and form as charged in the bill of indictment." Now, if the rule stated above be correct, the conclusion is excluded by the verdict

itself, that the jury passed upon any other question than that of the guilt or innocence of the accused.

But further : If the accused had pleaded guilty, or confessed his guilt, would the record have shown more than is shown by the verdict, viz., "that the accused was guilty, in manner and form as charged in the bill of indictment"? In the event of such a plea, could the court have fixed the punishment, without the intervention of a jury? If it could not, then the sentence of the court on the verdict in the case before us, was unauthorized; if it could, then the statute prescribing alternative punishments at the discretion of the jury, is a nullity.

In such a prosecution, it is a mistake to suppose that the verdict of the jury, on a finding of guilty, determines whether the offense charged is a *felony* or a *misdemeanor*. A felony, within the meaning of our Code, "is a public offense, punished with death, or which is *or may be* punished by confinement in the penitentiary."—Code, § 3071. In every such prosecution, the punishment *may be* imprisonment in the penitentiary; consequently, every offense denounced by the section is a felony; and the same remark is applicable to section 3085 of the Code, which provides alternative punishments for the offense therein named, in terms similar to those used in the statute before us.

6. The amendment to section 3178 did not change the punishment, and inflict a greater punishment than the law annexed to the crime when committed; it simply provides a *mitigated alternative punishment*, at the discretion of the jury; fine, or fine and imprisonment in the county jail, one or both, at the discretion of the jury, being considered a mitigated punishment, as compared with imprisonment in the penitentiary not less than two, nor more than five years. Therefore, the amendment in question is not obnoxious to the objection of being an *ex-post facto* law, within the prohibition of the constitution.—*Calder v. Bull*, 3 Dallas, 386; 1 Bishop's Criminal Law, § 219, and authorities there cited.

7. The reversal of the judgment, because of the defective verdict of the jury, and unauthorized sentence of the

court thereon, will not entitle the prisoner to be discharged, as is contended. It is the settled law of this State, that if one has been convicted of a felony, and the judgment has been reversed at his instance, or a new trial granted on his motion, he may be tried again.—*Cobia v. The State*, 16 Ala. 781.

For the error we have pointed out, the judgment is reversed, and the cause remanded ; and the prisoner will remain in custody until discharged by due course of law.

BYRD, J.—I dissent from the conclusion arrived at by the court. I think that the verdict and judgment are correct, and, therefore, should be affirmed. I hold, that the amendment to section 3178 of the Code is void and inoperative. So much of that section as considered necessary, and the amendment thereto, the latter being in italics, are as follows : “must, on conviction, be imprisoned in the penitentiary, not less than two, or more than five years, *or by fine and imprisonment, one or both, at the discretion of the jury trying the same.*” After the first “or” in the amendment, it is legitimate to imply the words “*be imprisoned*”; and, after diligent search, I find no authority for interpolating the word “punished” for imprisoned, as my brethren have done. In no definition to be found is the latter defined to be the synonym of the former ; nor is the word “punish,” or any of its derivatives, used to define the word “imprison,” or any of its derivatives.

Mr. Bishop, in his eminent work on Criminal Law, (2 ed. § 67,) says : “But we can not import into an act words which the legislature did not put in it”; and see the authorities cited by him. Words may be transposed ; a disjunctive conjunction has been construed as a conjunctive conjunction, and *vice versa* ; and words which have been used in one place in a section of an act, may be understood as used where omitted ; as in the case above mentioned in the section under consideration, the words “*be imprisoned*” may be understood after the word “or” in the amendment. But I have never found in any law-book any principle which would authorize a court to substitute words not used in the act.

Again, if the words "be imprisoned" are to be understood after the first word in the amendment, then, to my mind, the amendment is an absurdity and senseless, and therefore it should be held to be void. And even if the words "be punished" were understood, then the words "imprisonment," and "one or both, at the discretion of the jury," are so loose and uncertain in their meaning that the amendment should be held to be void. Who can say whether the word "imprisonment" means imprisonment in the penitentiary, provided in that section of the Code, or imprisonment in the jail of the county, as provided in section 3301 of the Code? And who can tell whether the words "one or both, at the discretion of the jury," give them a discretion only as to the fine and imprisonment prescribed in the amendment, if imprisonment there means in the county jail, or whether it gives the jury a discretion between the imprisonment prescribed in that section of the Code, and the "fine and imprisonment" prescribed in the amendment?

A statute may be drawn in terms so ambiguous, or confused, that the courts can not, with reasonable certainty, discern its meaning; and then they should pronounce it void for this cause.—*The State v. Boon*, 1 Taylor, 246; *Chezem v. The State*, 2 Carter, (Ind.) 149; *ib.* 523; 1 Bish. Cr. Law, § 55. In section 88 Mr. Bishop says, that the courts "can only use the material which these laws furnish them."

For these reasons, I hold the amendment to be wholly inoperative. I express no opinion upon the proper construction of the amendment, as I do not reach that point in the course of my investigation.

HART *vs.* THE STATE.

[INDICTMENT FOR GAMING,]

1. *Ex-post-facto law; conviction on testimony of accomplice.*—The act approved December 5, 1863, providing that section 3600 of the Code, which prohibited a conviction in a criminal case on the uncorroborated testimony of an accomplice, “shall not extend to trials on indictments for misdemeanors,” does not apply to prosecutions for misdemeanors committed prior to its passage: to make it apply to such cases would be violative of the constitutional provision against *ex-post-facto* laws. (WALKER, C. J., *dissenting.*)

FROM the Circuit Court of Henry.

Tried before the Hon. J. McCaleb Wiley.

THE bill of exceptions in this case is as follows :

“The defendant was indicted at the November term, 1860, of said circuit court, for gaming; the indictment being in the usual form. On the trial, at the present fall term, 1865, the State introduced a single witness, one W. J. Singletary, who testified, that within the twelve months before the finding of the indictment, and within said county, he saw the defendant and others play a game of cards; that the playing took place in a house formerly used as a shoe-shop, but which was used at the time of the playing, and for several months previously, as a bed-room by an old man named Grace; that no business was carried on or transacted there; that persons frequently resorted thither for the purpose of playing; that said witness and defendant were in co-partnership in betting on said game, or ‘going halves’ with each other; and that he (witness) frequently played defendant’s hand in said game. This being all the evidence in the case, the defendant demurred thereto—1st, because the evidence was not sufficient to convict the defendant, as it did not show that said playing took place at any of the places prohibited by section 3243 of the Code; 2d, because the witness was an

accomplice, and no conviction could be had, under section 3600, on his uncorroborated testimony; and that the act amendatory of said section, approved December 5, 1863, when applied to an indictment found before its passage, is *ex post facto*; and that the defendant should have his case passed upon under the law which was of force at the finding of the indictment. The solicitor, on the part of the State, joined in the demurrer, and the court overruled the demurrer; to which the defendant excepted. The court then rendered judgment against the defendant, for twenty-five dollars, and costs; to which the defendant excepted."

W. C. OATES, for the prisoner.—The demurrer to the evidence ought to have been sustained, because the playing was not at any of the places prohibited by the statute; and because the only witness for the State was an accomplice, whose uncorroborated testimony was not sufficient to authorize a conviction.—Code, § 3600; *Davidson v. State*, 33 Ala. 350; *English v. The State*, 35 Ala. 428. To sustain a conviction in this case, on the uncorroborated testimony of an accomplice, under the amendatory act approved December 5, 1863, would be violative of the constitutional prohibition against *ex-post-facto* laws.—*Calder v. Bull*, 3 Dallas, 391; 1 Kent's Com. 408.

JNO. W. A. SANFORD, Attorney-General, *contra*.—1. A room, to which persons frequently resort for the purpose of playing cards, is within the prohibition of section 3243 of the Code.—*Cameron v. The State*, 15 Ala. 384; *Campbell v. The State*, 17 Ala. 370; *Coleman v. The State*, 20 Ala. 370; *Windham v. The State*, 26 Ala. 71.

2. The act approved December 5, 1863, amendatory of section 3600 of the Code, merely fixes the value of a particular kind of evidence in certain cases, but does not introduce a new kind of evidence, nor make criminal an act which was innocent when committed, nor increase the penalty of offenses already perpetrated. It is, therefore, not an *ex-post-facto* law, in its application to this case. 1 Bishop's Criminal Law, § 108; Story on the Constitution, § 1345; *Calder v. Bull*, 3 Dall. 391.

JUDGE, J.—By both the Federal and State constitutions, the legislature is prohibited from passing *ex-post-facto* laws; and it is well settled, that the phrase *ex post facto*, in these constitutions, extends to *criminal*, and not to *civil* cases. What are *ex-post-facto* laws, within the meaning of the prohibition? As early as 1798, in *Calder v. Bull*, (3 Dallas, 386,) the supreme court of the United States, in considering whether an act of a State legislature was in violation of the prohibition against *ex-post-facto* laws, deemed it expedient to define fully the meaning of that provision in the constitution; and it was held that the prohibition included—1st, every law that makes criminal an action done before the passing of the law, and which was *innocent* when done, and punishes such action; 2d, every law that *aggravates a crime*, or makes it *greater* than it was when committed; 3d, every law that *changes the punishment*, and inflicts a *greater* punishment than the law annexed to the crime when committed; 4th, every law that alters the *legal* rules of evidence, and receives *less* or *different* testimony than the law required at the time of the commission of the offense, *in order to convict the offender*. All these, and similar laws, it was held, are prohibited by the constitution. This statement of what are *ex-post-facto* laws, within the words and intent of the constitutional prohibition, has since been generally adopted and followed by the different courts, whenever the question has arisen. Chancellor Kent quotes it, in substance, without disapproval; and Judge Story, in his Commentaries on the Constitution, says, it has been, and is, the general interpretation.—1 Kent, 409; 2 Story's Com. on the Con. 1345.

We will now apply the fourth clause of this interpretation to the case before us. The defendant in the court below was indicted, in 1860, for playing at cards, against the prohibition of the statute. At the time the indictment was found, and before the alleged commission of the offense, section 3600 of the Code was in full force, and applied to all criminal prosecutions. That section was as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by such other evi-

dence as tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof." Pending the prosecution against the defendant, the legislature passed an act, approved December 5th, 1863, which is as follows: "That section 3600 of the Code shall not extend to trials on indictments for misdemeanor."—Sess. Acts, '63, p. 73. The offense for which the defendant was indicted, is a misdemeanor; and on the trial in the circuit court, an accomplice in the criminal act was introduced as a witness against him. By the sole, uncorroborated testimony of this accomplice, the defendant, under the ruling of the court, was convicted; convicted by testimony which the law declared *insufficient* to produce conviction, at the time of the alleged commission of the offense. How was this effected? by a change in the law—by an act of the legislature, under the influence of which the court must have acted, which altered a legal rule of evidence, and received *less* testimony than the law required at the time of the commission of the offense, *in order to convict the offender*.

A construction which gives to a statute a retrospective effect, has always been esteemed odious, and will never be indulged unless the language employed requires it. Such statutes are justly considered as violative of every sound principle.—Dwarris on Statutes, 681; Shepherd's Digest, p. 745, § 17. Besides, to give the act of December, 1863, retroactive effect, would make it an *ex-post-facto* law, within the meaning of the constitution. We are constrained to hold it can have no such effect. It follows that the circuit court erred in rendering judgment against the defendant, on the demurrer to the evidence.

This view renders it unnecessary to notice any other question in the case.

Let the judgment be reversed, and the cause be remanded.

A. J. WALKER, C. J.—By a law of this State, a conviction upon the uncorroborated testimony of a certain class of witnesses was prohibited. This law was subse-

quently repealed as to misdemeanors. The argument that the repealing law, in its operation upon antecedent offenses, is *ex post facto*, rests entirely upon the announcement by the suprême court of the United States, that a statute is *ex post facto* which alters "the legal rules of evidence", and receives "less or different testimony" "in order to convict the offender".—1 Kent's Com., m. p. 409. This principle has been incorporated into the American textbooks and American decisions, on the high authority of the supreme court of the United States, with but little comment or explanation. I understand the rule to refer to changes in the measure or character of evidence requisite to conviction, and not to cautionary regulations as to the instruments by which the evidence is conveyed to the jury. The evidence necessary to convict is not changed by the later statute in this case. A criminal cause may be affected by a change in the instruments of evidence, produced by social influences, precisely analogous to that which is effected by the alteration of the law now in hand. A witness, upon whose testimony a conviction depends, may be of such bad reputation when an offense is committed, that a jury could not credit him, or convict on his uncorroborated testimony; and by good conduct, or the correction of false impressions, his reputation may be restored before the trial, and a conviction legally and properly obtained upon his uncorroborated evidence. It might as well be said that the evidence necessary to convict was thus changed by social influence, as that such a change has been produced by the law in this case. There is here no change of the ingredients of the offense, or of the facts which constitute guilt. There is a mere change of a rule of credibility. The old law attached to an uncorroborated accomplice an unvarying presumption of incredibility. This presumption is withdrawn in misdemeanors by the later law; and this withdrawal by no means effects any alteration of the degree, measure, or character of evidence, necessary to convict. I therefore think that the law is not *ex post facto*, and dissent from the opinion of my brethren.

BYRD, J.—Since the delivery of the opinion in this cause, the Chief Justice has filed a dissenting opinion, which he intimated at the time he reserved the right to do. After hearing it read, I deem it proper to express my adherence to the conclusion arrived at in the former, and to submit my reasons therefor.

The construction of the constitutional provision against *ex-post-facto* laws, given in the case of *Calder v. Bull*, (3 Dal. 391,) has been too long acquiesced in and recognized, by repeated and uniform adjudications, to be now disturbed; and it seems to me that the only open question is as to its application to cases as they may arise. A majority of the court hold, that the rule which prohibits the conviction of a person, charged with the commission of an offense, “upon less or different” testimony than was required by law at its commission, is applicable to this case.

At the time the offense is alleged to have been committed, the appellant could not have been convicted on the evidence upon which he was convicted. To convict him, the law required, as it stood at the time the offense is alleged to have been committed, the additional evidence of another witness, besides an accomplice, to prove such corroborating facts “as tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely show the commission of the offense, or the circumstances thereof.”—Code, § 3600. Upon the trial, he was convicted on the uncorroborated testimony of an accomplice, which, at common law, was looked upon with great suspicion; and it seems to me that such flimsy and unreliable testimony is less than, if not different from, that required by law at the time the offense is alleged to have been committed; and would seem to dispense with the *material* rule, that such testimony must be corroborated by evidence which tends “to connect the defendant with the commission of the offense”. It, of course, required the additional testimony of another witness, not implicated with the offender; for no number of accomplices would have met the requirements of the law. If, then, the conviction on the sole testimony of an accomplice, is not less

evidence than that required at the time of the alleged commission of the offense, as shown, it is difficult for me to conceive what is meant by the rule laid down in *Calder v. Bull*, *supra*.

To hold the law to be otherwise than as declared and applied in this case, would, in the opinion of a majority of the court, be to announce the proposition, that the legislature might pass an act authorizing the conviction of a defendant upon less evidence when he is tried than was *positively required by law* for his conviction when the offense was committed, in disregard of the interpretation of the constitutional inhibition against the passage by the States of *ex-post-facto* laws. In addition to the authorities cited in the opinion of the court delivered by Justice JUDGE, we refer to the following: *Woart v. Winnick*, 3 N. H. Rep. 475; *Carpenter v. The State of Pennsylvania*, 17 How. (U. S.) Rep. 463. In this latter case, Justice Campbell, in delivering the opinion of the court, approves by citing the above cases, though by some clerical mistake the case in 3 N. H. Rep. is referred to page 375, instead of 475. He also cites 6 Cranch, 87; 8 Peters, 88; 11 *ib.* 421; 5 Mon. 133; 9 Mass. 363; 6 Binn. 271; and 4 Geo. 208, which announce an adherence to the rules laid down in *Calder v. Bull*.

These views, and a reference to the above authorities, have been called forth in response to the dissenting opinion of the Chief Justice, and not from any substantial doubt as to the conclusiveness of the reasoning or the correctness of the conclusion of the opinion of the court delivered by Justice JUDGE.

MILES (FREEDMAN) vs. THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Act of December 15, 1865, "more effectually to prevent the offenses of grand larceny, arson, and burglary"; constitutionality of.*—The act approved December 15, 1865, entitled "An act the more effectually to prevent the offenses of grand larceny, arson, and burglary." (Session Acts, 1865-6, p. 116,) is not violative of the constitutional provision (art. iv, § 2) which declares, that "each law shall embrace but one subject, which shall be described in the title."
2. *Same, held applicable only to future offenses.*—The said act of December 15, 1865, does not repeal by implication section 3184 of the Code, as to offenses committed prior to its passage, but applies only to offenses afterwards committed, leaving prior offenses to be punished by the old law.

FROM the Circuit Court of Lowndes.

Tried before the Hon. F. BUGBEE.

THE indictment in this case was found on the 26th October, 1865, and charged the prisoner, Stephen Miles, a freedman, with feloniously breaking and entering "a smoke-house, a building within the curtilage of the dwelling-house of Aquilla Miles, but not forming a part thereof, with intent to steal," and stealing therefrom one thousand pounds of bacon, of the value of three hundred dollars. The defendant pleaded not guilty, without objection to the indictment; and was tried at the May term, 1866. On the trial, as the bill of exceptions shows, it was proved that the offense was committed on the night of the 3d September, 1865. The defendant asked the court to instruct the jury, that if they believed, from the evidence, that the offense was committed on that night, "yet the defendant can not be found guilty and convicted, because there is no law in existence under which he can legally be punished." The court refused this charge, and the defendant excepted to its refusal. The jury returned a verdict of guilty, and the court thereupon sentenced the defendant to four years' imprisonment in the penitentiary.

W. F. WITCHER, and R. H. DAWSON, for the defendant, contended—1st, that the act approved December 15, 1865, entitled “An act the more effectually to punish the offenses of grand larceny, arson, and burglary,” repealed by implication section 3184 of the Code, and other laws prescribing the punishment of the prescribed offenses; citing the following authorities: 1 Bishop on Criminal Law, 91–2, § 205; *Whitworth v. The State*, 8 Porter, 434; *Smith v. The State*, 1 Stewart, 506; *The State v. Jordan*, 15 Ala. 746; *Wyman v. Campbell*, 6 Porter, 219; 2 Bibb, 96; 1 Ham. (Ohio) 10; 4 Wash. C. C. 691.

2. That section 3184 of the Code being thus repealed, and the repealing law containing no exception or saving clause as to past offenses, there could be no conviction under the repealed law.—*Freeman v. The State*, 6 Porter, 372; *Yeaton v. United States*, 5 Cranch, 281; *Allaire v. The State*, 14 Ala. 435.

3. That the said act of December 15, 1865, is not unconstitutional; that it relates to but one subject—*i. e.*, the prevention of the specified offenses, and that subject is distinctly stated in the title.—*Ex parte Pollard*, at the present term.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The act approved December 15, 1865, relates to several distinct subjects, and is, therefore, violative of the second section of the fourth article of the constitution.—*Davis v. The State*, 7 Maryland, 161. This provision of our constitution having been taken from that of Maryland, it should receive the same judicial construction.—4 Cal. 46. This law being void, the prisoner was properly convicted under section 3184 of the Code, which was of force at the time of the commission of the offense, and at the time of the trial.

2. If the said act of December 15, 1865, be held valid, it must be applied only to offenses committed after its passage, leaving prior offenses to be punished under the former laws. This construction gives effect to every word of the statute, reconciles two affirmative statutes, avoids the repeal of a former law by implication, by which a number of criminals would be released, and accords with the decisions.—*Com-*

monwealth v. Pegram, 1 Leigh, 569; *Commonwealth v. Allen*, 2 Leigh, 727; *Commonwealth v. Pitman*, 2 Rob. Va. 800; *Gilman v. Shuter*, 2 Lev. 227.

JUDGE, J.—The prisoner was indicted for burglary, under section 3183 of the Code, which defines that offense in this State. Section 3184, at the time the indictment was found, prescribed the punishment for the offense, and is as follows: "Any person who commits the crime of burglary, on conviction, must be imprisoned in the penitentiary, not less than three, or more than fifty years."

An act of the legislature, approved December 15, 1865, "the more effectually to prevent the offenses of grand larceny, arson, and burglary," is as follows: "Be it enacted," &c., "that from and after the passage of this act, any person, or persons, who shall be guilty of the offense of grand larceny, arson, or burglary, on conviction thereof, shall suffer death, or be imprisoned in the penitentiary for any period not less than five years, at the discretion of the jury trying the same."—Acts 1865–6, p. 116. It is contended, that this act embraces more subjects than one, and that, consequently, by the latter clause of the second section of the fourth article of the State constitution, it is void.

The act embraces but the *single subject* of the *prevention* of the offenses therein named; and this subject is sufficiently described by its title, which is, "An act the more effectually to prevent the offenses of grand larceny, arson, and burglary."—See *Ex parte Pollard*, and *Ex parte Woods*, at the present term. The case of *Davis v. The State*, 7 Maryland, 151, does not militate against this view, as is supposed, but, on the contrary, is in accordance with it.

2. In behalf of the prisoner, it is contended, also, that the act of December, 1865, repealed section 3184 of the Code, without a saving clause as to offenses committed prior to the repeal; and that, consequently, there was at the time of the trial no law under which the prisoner could have been punished. The act makes no change in the character of the offense, as it is defined in section 3183 of the Code; it simply changes the punishment provided by section 3184. There is no repealing clause in the act, and

if the former law is repealed, it is by implication only. We admit the rule to be, that every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto. "But subsequent statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words; neither hath a latter statute ever been construed to repeal a prior statute, unless there be a contrariety or repugnance in them, or, at least, some notice taken in the latter statute of the preceding one, so as to indicate an intention in the law-makers to repeal it."—*Allen's case*, 2 Leigh, 727, and authorities there cited. Repeals by implication are not favored. When the legislature intend to repeal a statute, we may, as a general rule, expect them to do it in express terms, or by the use of words which are equivalent to an express repeal. *No court will, if it can be consistently avoided, determine that a statute is repealed by implication.*—*Ludlow's Heirs v. Johnston*, 3 Ohio, 553. When two affirmative statutes exist, one is not to be construed to repeal the other, by implication, *unless they can be reconciled by no mode of interpretation.*—*Dodge v. Grindley*, 10 Ohio, 178.

Section 3184 of the Code, and the act of December, 1865, being both affirmative statutes, when does the contrariety or repugnance in them effect a repeal of the former by the latter? The latter statute has operative effect, only as to the offenses named therein, *when committed subsequent to its passage*. It can not have retrospective operation; its language and the constitution both alike forbid it. There is no conflict in the two statutes, then, as to the offenses named, when committed *prior* to the enactment of the latter statute; and, consequently, as to the offenses thus committed, there is no repeal by the latter of the prior law. To this extent, the two may well stand together; but, when the field of operation becomes entirely covered by the latter statute, the former is repealed by the repugnance in the two, by analogy to a principle in nature, that no two things can occupy precisely the same space at the same period of time.

We recognize the correctness of the rule, that "the legis-

lative intent must, in some way, appear affirmatively on the face of the new statute, to be strictly construed, that former offenses be prosecuted or punished under the former provision, or it will not so operate.”—1 Bishop’s Criminal Law, § 217. Such intent, we think, is sufficiently shown on the face of the act of December, 1865. As we have before stated, no repeal is made therein of the former statute, nor is any direct notice taken of it; and repugnance to the former law seems to have been guarded against, by the use of words expressly limiting the operation of the act to the future. It may be said, however, that the words, “*from and after the passage of this act,*” which thus confine it in its operation, are surplusage; that the prohibition of the constitution against the passage of *ex-post-facto* laws, would have effected the same purpose. In so far as regards the application of the act in the infliction of punishment, this is true; but the constitutional prohibition would not have prevented a *repeal* of the former statute as to past offenses, by repugnance; and hence, repugnance as to these was guarded against and prevented, by the use of the words quoted, which perform the office of a saving clause.

Our conclusion is, that the act of December, 1865, does not repeal the previous punishment prescribed by section 3184 of the Code, except in the case of future offenses; and this conclusion is fully sustained by authority.—*Commonwealth v. Pegram*, 1 Leigh, 569; *Allen v. Commonwealth*, 2 Leigh, 727; *Pitman v. Commonwealth*, and *Wright v. same*, 2 Robinson’s Va. Rep. 800.

There is no error in the record, and the judgment of the circuit court is affirmed.

LA VAUL vs. THE STATE.

[INDICTMENT FOR LARCENY OF MULE.]

1. *Bringing stolen property into this State; form of indictment.*—An indictment for bringing into this State property stolen elsewhere, (Code, § 3138,) must be framed under the statute which creates the offense: a conviction cannot be had under an indictment in the form prescribed for larceny.

FROM the Circuit Court of Madison.

Tried before the Hon. W. J. HARALSON.

THE indictment in this case, which was found on the 14th March, 1866, charged that, before the finding thereof, "Walter LaVaul feloniously took and carried [away] a horse mule, the property of William T. Medley, of the value of more than one hundred dollars; against the peace," &c. "On the trial," as the bill of exceptions states, "the State introduced W. T. Medley as a witness, who proved, that he lived in Warren county, Tennessee; that in February, 1866, he owned a large, brown horse mule; that said mule was there stolen from him, on the — day of February, 1866; that he came on the next day, and tracked the mule to Huntsville, Alabama, and there found him in the possession of the defendant; and that the mule was worth one hundred and twenty-five dollars. The defendant moved the court to exclude from the jury that portion of the evidence which had reference to the taking of the mule in Tennessee; which motion the court overruled, and the defendant excepted. The defendant then moved to exclude all the evidence; which motion the court also overruled, and the defendant excepted. There was no other evidence offered. The court charged the jury, that it was immaterial where the mule was stolen, if they believed that it was stolen, and found in the possession of the defendant, and that possession was unexplained. The defendant excepted to this charge, and requested the court to instruct the jury,

1st, that if the mule was stolen in Tennessee, the defendant could not be convicted under this indictment; 2d, that if they believed the evidence, they would find the defendant not guilty of the offense charged in the indictment. The court refused each of these charges, and the defendant excepted to their refusal."

WALKER, BRICKELL & LEWIS, for the prisoner.

JNO. W. A. SANFORD, Attorney-General, *contra*.

JUDGE, J.—The indictment in this case is in the usual form for the larceny of a mule, averred to be "over the value of one hundred dollars." The only evidence as to the larceny was, that the mule had been stolen in the State of Tennessee, and was found in the possession of the prisoner in the county of Madison, shortly after the offense had been committed. Section 3138 of the Code provides, that this offense shall be punished in the same manner, and to the same extent, as if the property thus brought into, had been stolen in the State; and the main question to be determined is, whether the prisoner should not have been indicted under the statute, instead of for grand larceny as at common law.

It was decided in England, at an early period, that where goods, seized piratically on the ocean, were carried by the thief into a county in England, the common-law judges would not take cognizance of the larceny; "because," said they, "the original act, namely, the taking of them, was not any offense whereof the common law taketh knowledge; and, by consequence, the bringing of them into a county could not make the same felony punishable by our law." *Butler's case*, cited in 13 Co. 53; 3 Inst. 113. And this doctrine has been applied, in England, both to goods stolen in other parts of the king's dominions, and to goods stolen in foreign countries.—1 Bishop's Cr. Law, § 105, and cases there cited. See, also, Leading Cr. Cases, 224.

So far as respected goods stolen in Scotland, this inconvenience in the law was remedied by the statute of 13th Geo. 3, ch. 31.—*Simmons v. Commonwealth*, 5 Binney, 617. The reason for the distinction between such a case,

and stolen goods carried from one county into another in the same state or kingdom, is thus stated by Yeates, J., in the case last cited: "In the latter instance, general laws pervade the whole government, and prescribe penalties on distinct offenses. The *autre fois* convict in one county, may be pleaded in bar to another prosecution for the same offense in another county. But not so as between distinct and independent states governed by different laws."

Upon this doctrine of the common law, there has been a contrariety of decision in the American courts; some of the States applying the English doctrine, and others discarding it.—See Bishop's Cr. Law, § 108, for the cases. And some, if not most of the States, now have statutes remedying the defect or inconvenience in the common law, above stated.

As early as 1807, Alabama being then under a territorial government, the legislature provided for the punishment of the offense of stealing horses, or other goods and chattels, "from any person in any place out of the territory," and afterwards having the same in possession within the territory; any person thus offending, it was provided, might be "indicted for horse-stealing, or other larceny," in whatever county he might be found with the stolen property in possession.—Aiken's Digest, 120, § 30. The first case reported as having occurred under this territorial statute, which afterwards became the law of the State, is *The State v. Seay*, 3 Stewart, 123. In that case, the indictment was framed under the statute, notwithstanding the phraseology of the act, that the person offending might "*be indicted for horse-stealing or other larceny.*" The offense was regarded by the court as one of statutory creation; the principal question raised and relied on by the prisoner was, that the act creating the offense was unconstitutional; and the judgment of the court was reversed, because the indictment did not charge that the possession of the property in this State was *felonious*.

Subsequently, (in 1841,) a penal code for the State was adopted, the 18th section of the 4th chapter of which was as follows: "Every one who shall inveigle, steal, carry, or entice away any slave, with the view to convert such slave

to his own use, or the use of any other person, or to enable such slave to reach some other State or country, where such slave may enjoy freedom, such person shall, on conviction, be punished by confinement in the penitentiary, not less than ten years.”—Clay’s Digest, 419. By the 57th section of the same chapter of that code, it was provided that the offense of grand larceny should be punished “by imprisonment in the penitentiary, not less than two, nor exceeding five years”; (Clay’s Digest, 425;) and by the 25th section it was provided, that “every person who shall fraudulently, or feloniously, steal the property of another in any other State or country, and shall bring the same within this State, may be convicted and punished in the same manner as if such larceny had been committed in this State; and in every such case, such larceny may be charged to have been committed in any county in or through which such stolen property may have been brought.”—Clay’s Digest, 420.

The cases of *Williams v. The State*, (15 Ala. 259,) *Ham v. The State*, (17 Ala. 188,) and *Murray v. The State*, (18 Ala. 727,) were decided under the influence of the statutes last above mentioned. In each of these cases, all relating to the larceny of slaves, it was held, that the indictment should be framed under the 18th section of the penal code, and not under the 25th section. It was not proper to indict, as at common law, for the offense of grand larceny, because the stealing of a slave had been made a *statutory* offense by the 18th section, with a higher penalty than was prescribed for the offense of grand larceny. “It may, however, be argued”, says Dargan, C. J., in *Murray v. The State*, (*supra*,) “that the indictment might be framed under the 25th section, and the prisoner convicted of grand larceny, and receive the same punishment that would be awarded upon the conviction of this offense. The answer to this argument must be, that the prisoner then would not suffer the same punishment as he would if the original larceny had been committed in this State, and if it had been, he could only be indicted under the 18th section, and could be punished only by or *in accordance with its provisions*. He therefore must be punished as he would have been had the original larceny been committed in Alabama;

and to do this, he must be indicted under the 18th section."

There is a difference in the language between the 25th section of the old penal code and section 3138 of our present code. The person offending, under the latter, is not to be *convicted in the same manner* as if the property had been stolen in this State, as is the provision in the 25th section of the former; but, he is to be *convicted of the offense as defined by the statute*.—*The State v. Ward*, 6 New Hamp. 529. The language of the old code would seem to imply that there was a necessity, while it was in force, for proceeding in the *same manner*—that is, *under the same statute*—as if the offense had been committed in this State.

We feel constrained to hold that the indictment in the present case should have been framed under section 3138 of the Code, which is introductive of an offense not known to the common law: *Williams v. The State*, *Ham v. The State*, and *Murray v. The State*, (*supra*,) do not militate against the correctness of this conclusion, which is strengthened, as has been correctly contended in the argument for the prisoner, by a reference to other sections of the Code. Sections 3139, 3140, 3141, 3143, 3144, 3145, 3147, and 3148, all provide, that any person who may be convicted of the offenses therein severally defined, shall "be punished as if he had feloniously stolen such property". Forms of indictments framed under most of these sections, which severally define the offenses to which they relate, are given in the Code; and there is thus afforded a statutory authority requiring the indictment in this case to be framed under the section of the Code creating the offense. It will not, we apprehend, be contended by any one that a conviction could be had under either of said sections, on an indictment in the usual form for larceny.

It follows from what we have said, that the circuit court erred in the charges given covering this question, and in refusing to charge thereon as requested; and this conclusion renders it unnecessary to notice any other question presented by the record.

The judgment of the circuit court is reversed, and the cause remanded; and the prisoner will remain in custody until discharged by due course of law.

MOORE ET AL. *vs.* THE STATE.

[INDICTMENT FOR LARCENY.]

1. *Sufficiency of indictment.*—In an indictment which charges that the defendants “feloniously took and carried away *from a dwelling*” certain articles of personal property, the italicized words, if not equivalent to a charge of larceny “in a dwelling-house,” (Code, § 3170,) nor liable to be rejected as surplusage, are at most mere matter of description, which it may be necessary to prove on the trial, and do not affect the sufficiency of the indictment.
2. *Sufficiency of verdict.*—Under such an indictment, a verdict finding the defendants “guilty of larceny of the property, as charged in the indictment,” and assessing the aggregate value of the stolen property “at fifty dollars in silver and gold,” is sufficient to support a judgment of conviction and sentence to three years’ imprisonment in the penitentiary.
3. *Act of December 15, 1865, changing punishment of grand larceny, arson, and burglary, applicable only to subsequent offenses.*—The act approved December 15, 1865, entitled “An act the more effectually to prevent the offenses of grand larceny, arson, and burglary,” (Session Acts, 1865–6, p. 116,) applies only to offenses committed after its passage, and leaves the former laws in force as to offenses committed prior to its passage.

FROM the Circuit Court of Tuscaloosa.

Tried before the Hon. WM. S. MUDD.

THE record in this case contains only the indictment, and the judgment-entry showing the trial and conviction; which are in the following words:

• “Circuit Court, Special Term, December, 1865.

“The grand jury of said county charge, that before the finding of this indictment, Robert Moore, John Curtis, and Joseph Holsomback feloniously took and carried away from a dwelling two twenty-dollar gold pieces, and twenty half-dollar pieces in silver, the property of Elizabeth Goyne, of the value of fifty dollars; against the peace and dignity,” &c.

“And afterwards, to-wit, on the 4th April, 1866, the following proceedings were had in said cause :

“The State of Alabama, } This day came Alberto Martin,
 vs. } solicitor, who prosecutes for the
 Robert Moore, and } State, and also came the defend-
 Joseph Holsomback. } ants in their own proper persons;
 and thereupon came on to be heard the defendants’ demurrer to the bill of indictment; and, after argument of counsel thereon, it is considered by the court, that said demurrer be overruled,—the court holding that the indictment sufficiently charges a simple larceny, although it does not sufficiently charge a larceny from a dwelling-house. And the defendants, in their own proper persons, being arraigned on the bill of indictment, in their own persons severally pleaded thereto not guilty, and for trial severally put themselves upon the country; and the solicitor doth the like. Thereupon came a jury,” &c., “who, on their oaths, do say, ‘We, the jury, find the defendants guilty of larceny of the property, as charged in the indictment, and assess the value of the property alleged to be stolen at fifty dollars in silver and gold.’ And the said defendants, being severally asked what they had to say why the sentence of the law should not now be pronounced on them, say nothing. It is therefore the judgment, order, and sentence of the court, that each of said defendants be imprisoned in the penitentiary of the State for three years. But, because of certain questions of law, arising in the proceedings on the indictment, having been reserved for the consideration of the supreme court, it is ordered that the execution of the judgment and sentence of the court be suspended, as to each of the defendants, until the 10th day of August next. It is further considered by the court, that the State of Alabama, for the use of Tuskaloosa county, recover of said defendants the costs of this prosecution, for which let execution issue.”

W. R. SMITH, for the prisoners.

JNO. W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—1. Whether the words “feloniously took and carried away *from* a dwelling,” import a taking in a “dwell-

ing-house," or not, the demurrer should have been overruled. In the first case, the indictment would be good under section 3170 of the Code; and in the latter, it would be simple larceny, and good under section 3173. The words "from a dwelling" do not have the same import as "in a dwelling-house"; and section 3170 has been construed by this court.—1 Bish. Cr. Law, §§ 294-306; *Henry v. The State*, at last term. See, also, *Chambers v. The State*, 6 Ala. 855. The words "from a dwelling," used in the indictment, may, perhaps, be treated as surplusage; but if not, it is only, at most, matter of description, which, if necessary to be proven, can only be taken advantage of on the trial, and by asking an appropriate charge of the court. It is true, that the form in the Code, for the offense described in section 3170, uses the words "from a dwelling-house," instead of "in a dwelling-house"; yet, on the trial, the proof must show that the taking was "in a dwelling-house." But this is another objection which must be made in the progress of the trial, and not by demurrer to the indictment. The prisoners in this case saw proper to rest their defense, as to this point, on demurrer, and in no other manner; and as the sentence is for three years' confinement in the penitentiary, we can not tell, except from the entry made on the demurrer, whether the court sentenced them under section 3170 or section 3173. But it is evident from the ruling on the demurrer to the indictment, as set out in the judgment-entry, that the court sentenced the prisoners under the latter section.

2. The verdict is responsive to the indictment, and authorized the judgment rendered on it.—*Case v. The State*, 26 Ala. 17; *Jones v. The State*, 13 Ala. 157; *Hawkins v. The State*, 9 Ala. 137; *Nancy v. The State*, 6 Ala. 483. The evidence introduced on the trial is not set out in the record, and we must presume that the jury found the value in gold and silver, according to the evidence; and there is no error in such finding. Whether the indictment is to be taken as good under section 3170 or section 3173, the verdict responds to it in finding the "defendants guilty of larceny of the property *as charged* in the indictment"; and if defendants desired to raise any question on that point, they could

have done so by asking a charge of the court on the trial, and, if refused, excepting.

3. The counsel for the prisoner insists, that an act of the 15th December, 1865, (Pamph. Acts, p. 116,) is a repeal of sections 3170 and 3173 of the Code, as to the punishment; and argues that, as that act provides another and more aggravated punishment, it by implication repeals the punishment provided in said section of the Code, and that the new punishment can not be inflicted. We concede that the new punishment can not be inflicted, where it has been aggravated in comparison with the punishment declared by the law at the commission of the offense. The other branch of the argument this court has fully considered in the case of *Miles v. The State*, at this term, and in other cases; and its conclusion is adverse to the position taken by the prisoner's counsel.

It is insisted by the counsel, that the latter clause of the act of the 15th December, 1865, in these words, "at the discretion of the jury trying the same," secures to the prisoners the right to have the term of their imprisonment fixed by the jury, and at their discretion. But the penalty prescribed in the act is death, or imprisonment in the penitentiary for any period not less than five years. Now, here is a case of alternative punishments, as to which the jury is authorized to exercise a discretion, and inflict either. But, under sections 3170 and 3173, there is no alternative punishment as to which the jury can exercise any discretion; and, by section 3621, the court is required to fix the term of imprisonment. And this is an additional argument, if one was needed, to show that the legislature never intended by this act to repeal the sections of the Code (3170 and 3173) referred to, as to the punishment to be inflicted on offenses committed before that time. It is a grave question, whether the act affects section 3170 at all. It certainly does section 3173, which punishes "grand larceny" committed after *its* passage.

Legislative enactments often get the law into a twist difficult for the courts to unravel; but it is the duty of the courts to do so, if they can, and preserve the harmony and consistency of the statute and common law. We therefore

hold, that the discretion given to the jury by the act can only be exercised as to the alternative punishments prescribed by the act, and has no reference whatever to the punishment prescribed by the Code; and that alternative punishments prescribed by the act are *only* to be administered upon persons who, after the passage of the act, "shall be guilty of the offense of grand larceny," &c. The act certainly applies, by its terms, only to offenses committed after its passage. The ingredients of the offenses mentioned therein are not changed; the punishment, as to a certain class of persons, who after its passage "shall be guilty," is prescribed, and it is greater than the punishment prescribed by the prior law for the same offenses; and this, upon principles of the common law, neither expressly nor by implication, repealed the former statute.

Repeals by implication are never favored, and for such a repeal to take effect, the repugnancy must be clear. A statute is never repealed by the repugnancy of matter in a subsequent one, except to the extent of such repugnancy. If such repugnancy between two statutes effects a repeal of the former to the extent of the opposition, and leaves a field still for the independent operation of both, the latter does not repeal the former as to such matter not affected by the later statute. If a new penalty is provided, of such a *character* as repeals by implication the punishment prescribed by the former law for the same offense, then, if the new punishment aggravates the former, it can not be administered; nor can this be done though the former law is not repealed by implication or otherwise, if the offense was committed prior to the passage of the new statute. For instance, if the new statute provided that an offender could be punished, for an offense committed prior to its passage, by imprisonment in the penitentiary for five years, or by the punishment prescribed at the time of the commission of the offense, which was death, then the prisoner should at least have an election; but, if the new statute should provide that offenders prior to the passage of the act should be punished in a way which aggravated the punishment, though this would have been a good statute by the common law, yet, in this country, the constitutional provision against

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ex-post-facto laws prohibits the infliction of such a punishment.—*Calder v. Bull*, 3 Dal. 391; *Carpenter v. The State of Penn.*, 17 Howard, and authorities there cited.

The judgment is affirmed.

BILL MILLER ET AL. (FREEDMEN) vs. THE STATE.

[INDICTMENT FOR GRAND LARCENY.]

1. *Admissibility of confessions*.—Before the confessions of the prisoner, in a criminal case, can go to the jury as evidence, they must be shown to the satisfaction of the court, on consideration of the prisoner's age, condition, situation, and character, and the attendant circumstances, *prima facie* to have been made voluntarily; and the admission of the confessions to the jury, without such preliminary proof to the court, is erroneous.
2. *Same*.—The mere fact that a confession is made in answer to a question which assumes the prisoner's guilt, does not, *per se*, render the confession inadmissible.
3. *Proof of ownership of stolen property*.—Where it was shown that the stolen property was taken from the possession of the person who was alleged in the indictment to be the owner, but the evidence was conflicting as to the character of his possession—some of the evidence tending to show that it belonged to him individually, while there was also evidence which tended to show that he had previously sold it to the Confederate States, and merely held possession as agent or bailee; and the defendant thereupon requested the court to instruct the jury, "that if they were in any doubt whether the property belonged to him or to the government, they must give the defendant the benefit of the doubt, and acquit him"; which charge the court refused to give, without the qualification, "that if he had possession of the property as agent or bailee, they should convict the defendant,"—*held*, that there was no error in the refusal of the charge as asked, nor in the qualification given.
4. *Abolition of slavery by act of war, and applicability of general criminal statutes to freedmen*.—Slavery was abolished in Alabama by the act of war, prior to the passage of the ordinance of the State convention on the 22d September, 1865; and for offenses committed by freedmen since the abolition of slavery, they may be indicted, convicted, and punished, under the general criminal statutes applicable to other persons.
5. *Punishment of grand larceny*.—The act approved December 15, 1865,

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entitled "An act the more effectually to prevent the offenses of grand larceny, arson, and burglary," (Session Acts, 1865-6, p. 116,) applies only to offenses committed after its passage, and leaves the former laws in operation as to prior offenses.

FROM the Circuit Court of Sumter.

Tried before the Hon. JAMES COBBS.

THE indictment in this case, which was found at the October term, 1865, charged that "Bill Miller, Goodloe, and Patrick, negro freedmen, formerly slaves of William McRee, feloniously took and carried away three bales of cotton, the property of Stephen Horton, of the value of more than twenty dollars." The defendants were arraigned at the same term, and severally pleaded not guilty; and on the trial at the April term, 1866, as the bill of exceptions shows, the following proceedings were had:

"The State introduced Stephen Horton as a witness, who testified that, in the early part of September, 1865, three bales of cotton were taken from his pick-room in said county, of the value of more than twenty dollars; that he went to the prisoner Patrick, on the day after the abstraction of the cotton, and said to him, 'Patrick, you have been stealing my cotton; and it is better for you to tell me all about it, or I will prosecute you for it.' Said witness testified, also, that he was a justice of the peace at that time, and Patrick knew that fact; that Patrick then denied all knowledge of the cotton, and said that he did not take it; that he immediately left Patrick, and, in a short time afterwards, found the cotton on the plantation of William McRee, for whom the prisoner was laboring; that about an hour and a half after the finding of the cotton, he again went to Patrick, and said to him, 'Why did you not tell me about the cotton when I asked you before? Who was engaged with you in that matter, and what did you take it for?' Patrick replied, that when one had got into a scrape, he thought they had better keep out as long as they could; and said, that they took the cotton to sell, to get some money, and that Bill Miller, Goodloe, and Jake were with him. Witness said, that he then went to each of these parties separately, and asked them, who was

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engaged with them in taking the cotton, and what they took it for ; and that they replied, that each of the parties named was with them, and that they took it to sell to get some money.

“The foregoing being all the evidence of said witness on the subject of the confessions, the defendants each objected to allowing said confessions to go to the jury, on the ground that the same were not made freely and voluntarily, but were induced by the hope that it would be better to make them, and the fear of prosecution and punishment if not made. The court overruled these objections, and permitted said confessions to go to the jury ; to which ruling of the court each of the prisoners excepted. The State then offered William McRee as a witness, who testified, that on the same day the cotton was found, but after said Horton had left, he asked the defendants, what they had told him ; and that they answered, that they had told him all about it, that they thought it best to make a clean breast of it, and that they thought Mr. Horton would be better satisfied if they did. The prisoners then again moved the court to exclude said confessions from the jury, on the same grounds as before ; but the court overruled their objections, and permitted said confessions to go to the jury ; to which ruling of the court each of the prisoners then and there excepted.

“The witness Horton testified, that said cotton was his property, and had never been sold to the government. Other witnesses were introduced on the part of the defendants, whose testimony tended to show that said Horton had said that he had sold the cotton to the Confederate government ; while other witnesses testified, that said cotton had been sold to an agent of the Confederate government, but had remained in said Horton’s possession all the time until taken by the defendants, though it had been marked by an agent of the Confederate government. The defendants thereupon asked the court to give the following written charge : ‘The jury must be satisfied of the truth of every material allegation of the indictment ; and therefore, if, after weighing all the evidence, they are in any doubt, whether the cotton was the property of said Horton, or

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belonged to the government, they must give [the defendants] the benefit of the doubt, and acquit.' The court refused to give this charge, except with this qualification—'but, if they believed from the evidence, beyond a reasonable doubt, that Horton had possession of the cotton as agent or bailee, in the county of Sumter, and before the finding of the indictment, the defendants should be convicted.' To this ruling of the court, and the refusal to give the charge as asked, the defendants excepted.

"It was in evidence, also, that the prisoners were formerly slaves of William McRee; and that the offense was committed, if at all, in the early part of September, 1865, and prior to the 21st day thereof. The prisoners thereupon asked the court to charge the jury, that if the offense was committed before 21st day of September, 1865, (the date of the ordinance abolishing slavery in Alabama,) the prisoners could not be legally convicted and punished under the indictment, and it was the duty of the jury to acquit them. The court refused to give this charge, or to discharge the prisoners; to which ruling and refusal of the court the prisoners excepted."

The jury returned a verdict of guilty, and the court thereupon sentenced the defendants to three years' imprisonment in the penitentiary.

A. A. COLEMAN, for the prisoners.—1. Section 3173 of the Code, under which the prisoners were convicted and sentenced, was not in force at the time of the trial, having been repealed by the act approved December 15, 1865, which changed the punishment of grand larceny; and the latter act contains no exception, or saving clause, as to prior offenses.—8 Porter, 434; 4 Ala. 487; 9 N. H. 59; 10 Watts, 351.

2. The confessions of the prisoners were not shown to have been made voluntarily. On the contrary, it was affirmatively shown that the confession of Patrick was made to a judicial officer, by whom inducements were held out to elicit the confession; and as to the others, although all that occurred at the time is not stated, it appears that the confessions were made in answer to questions which as-

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sumed their guilt. The confessions ought not to have been allowed to go to the jury.—*Brister v. The State*, 26 Ala. 128 ; *Carroll v. The State*, 23 Ala. 38 ; 1 Greenl. Ev. §§ 219, 220, 221, 222.

JNO. W. A. SANFORD, Attorney-General, *contra*.—1. The indictment is sufficient to sustain the conviction, whether Horton held possession of the cotton as his own property, or as the agent or bailee of the Confederate States.—*Davis v. The State*, 17 Ala. 415 ; *Rex v. Woodson*, 1 Leach, C. C. 356 ; *Rex v. Parker*, *ib.* 357 ; 2 East's P. C. 653.

2. The confessions of the prisoners were made after the cotton was found, and when a denial by them of the crime was deemed useless. At the time of the confession, no inducement was offered to elicit it. It was voluntary, and was, therefore, properly admitted by the court.—*Mose v. The State*, 36 Ala. 211 ; *Aaron v. The State*, 37 Ala. 106, and authorities there cited.

JUDGE, J.—The principal question to be determined in this case is, whether the confessions of the prisoners, as shown by the record, were properly admitted in evidence. The law is well settled, that before a confession can be admitted in evidence to the jury, it should be shown, *prima facie*, to have been voluntarily made. Whether it was so made or not, it is for the judge to determine, before he admits it, upon consideration of the age, condition, situation, and character of the prisoner, and the circumstances under which it was made.—*Brister et al. v. The State*, 26 Ala. 107. The usual method of showing that the confession was voluntary, is by negative answers to the questions, "whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess ; or whether language to that effect had been addressed to him."—*Wyatt v. The State*, 25 Ala. 12, and authorities there cited ; also, 1 Phil. Ev. 542.

In the case before us, no such preliminary evidence was introduced. As to the prisoner Patrick, a threat was made to prosecute him, if he did not tell all about it. His subsequent confession was made, as it appears, in continua-

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tion of the conversation, (which was resumed,) in which the threat was made; and the threat may have induced the confession. As to the other prisoners, not only is there also absence of proof that their confessions severally were voluntary, but the record does not inform us that what the witness testifies to as having been said by him to them, which induced their confessions, is *all that he said*; as to them, he may have resorted also to the appliance of hope or fear. We are prohibited from indulging the presumption that proper evidence was introduced to show that the confessions were voluntary, by the recital in the bill of exceptions that all the evidence of the witness on the subject of the confessions is set out therein.

As to the strictness of the rule, which excludes confessions, as being procured by hopes held out, or fears excited, see the following decisions of this court: *Aiken v. The State*, 35 Ala. 399; *Bob v. The State*, 32 Ala. 560; *Clarissa v. The State*, 11 Ala. 57; *Wyatt v. The State*, *supra*; *Brister et al. v. The State*, *supra*; *Mose v. The State*, 36 Ala. 211; *Aaron v. The State*, 37 Ala. 106; *Franklin v. The State*, 28 Ala. 9; *Chambers v. The State*, 26 Ala. 59; *Frank v. The State*, 27 Ala. 37; *Spencer v. The State*, 17 Ala. 192.

2. A confession is not inadmissible, as is contended, because elicited in answer to a question which assumes the prisoner's guilt. The law seems to be well settled, that this, of itself, would not be sufficient to authorize the exclusion of the confession.—*Carroll v. The State*, 23 Ala. 28; 2 Leading Crim. Cases, 202, and authorities there cited.

3. There was no error in the refusal of the court to charge as requested, in respect of the title to the property alleged to have been stolen; nor in the charge as given upon that question.

4. The court properly refused to give the charge, that the prisoners could not be found guilty, if the evidence showed the offense for which they were indicted was committed prior to the 21st of September, 1865. The record shows the alleged offense was committed after the occupation of this State by the United States forces, and after the issue of the provisional governor's proclamation, but prior to the ordinance of the State convention, by which slavery was

declared to be abolished.—*Smith v. The State*, at the last term.

5. The position taken in the argument at the bar, that the act of the 15th of December, 1865, (Acts 1865-'66, p. 116,) repealed the section of the Code under which the prisoners were sentenced, cannot be sustained.—See *Stephen Miles v. The State*, at the present term, in which this question is discussed, and decided adversely to the prisoners.

For the error in admitting the confessions of the prisoners in evidence, as shown by the record, the judgment is reversed, and the cause remanded; and the prisoners will remain in custody until discharged by due course of law.

SEIBERT vs. THE STATE.

[INDICTMENT FOR RETAILING SPIRITUOUS LIQUORS.]

1. *Election by prosecution*.—In a prosecution for retailing spirituous liquors, the indictment being in the general form authorized by the Code, (§ 1059,) if the first witness on the part of the State is asked by the prosecuting attorney, whether, within the period covered by the indictment, “he had ever obtained liquor from the defendant’s store in quantities less than a quart”; and answers, “that he had never bought any liquor there, but that on one occasion, while in said store with others, defendant’s wife gave them a drink of liquor, for which he paid no money, nor saw any money paid,”—this does not amount to an election on the part of the prosecution to proceed only for violations of the statute in selling in less quantities than a quart.
2. *Criminal responsibility of principal for illegal act of agent*.—To authorize a conviction of the husband, for the illegal act of the wife in selling spirituous liquors in his store in his absence, the jury must be satisfied from the evidence, beyond a reasonable doubt, that her illegal act was done by his authority: that it was done by her as his clerk or agent, without more, is not enough.

FROM the Circuit Court of Sumter.

Tried before the Hon. JAMES COBBS.

THE indictment in this case contained but a single count, which charged that the defendant, Nicholas Seibert, before the finding of the indictment, "sold vinous or spirituous liquors, without a license, and contrary to law." "On the trial," as the bill of exceptions states, "one Peyton was offered as a witness on the part of the State, and was asked by the prosecuting attorney, whether or not, before the finding of the indictment in this case, and after the 20th July last, he had ever obtained liquor from the defendant's store in Belmont, *in quantities less than a quart*; and answered, that he had never bought any liquor there, but that on one occasion, when in said store with defendant and his wife, Mrs. Seibert gave him and others a drink of liquor, for which he paid no money, nor saw any money paid. The prosecuting attorney then asked, if Mrs. Seibert was acting as the defendant's clerk in said store; and the witness replied, that she was. This being all the testimony of said witness, he was discharged from the stand. One Grady was then introduced as a witness on the part of the State, and was asked by the prosecuting attorney, whether, before the finding of the indictment, and after the 20th July last, he had ever bought liquor from the defendant, at his store in Belmont, *and drunk the same on the premises*. The defendant objected to this question, and asked the court to require the prosecuting attorney to confine his questions to this witness to violations of the law in *selling in less quantities than a quart*, on the ground that the State had, by the examination of the witness Peyton, made an election to proceed for such violations. The court overruled the objection, and refused to require the prosecuting attorney to confine his inquiries as requested, and allowed the question to be asked and answered; to which the defendant excepted. Said Grady then testified, that on the 31st August, 1865, which was the same day the liquor was delivered by the defendant's wife to the witness Peyton, he went into the defendant's store, in the town of Belmont in said county, and bought three drinks of liquor from the defendant's wife, who was acting in the capacity of clerk in said store, and paid seventy-five cents therefor, and drank the same in the store; that the defendant was not present at the time of the sale, but was

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absent from the town of Belmont, on his way to Demopolis. This being all the evidence in the cause, the court charged the jury, that if they believed, from the evidence, beyond a reasonable doubt, that the defendant's wife was acting as his clerk in his said store, and sold liquor in less quantities than a quart, and the same was drunk in said store in the county of Sumter, after the 20th July last, and before the finding of the indictment, then they must find the defendant guilty; otherwise, they must acquit him. To this charge the defendant excepted."

A. A. COLEMAN, for the defendant.—1. In the examination of the witness Peyton, the State made an election; and should have been held to it.—*Elam v. The State*, 26 Ala. 48; *Cochran v. The State*, 30 Ala. 542.

2. The defendant was not criminally responsible for the act of his clerk, performed in his absence, and without his knowledge or consent. To make him liable, he must either co-operate in the illegal act, or expressly authorize it.—*Patterson v. The State*, 21 Ala. 571.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. If the court erred in refusing to compel the solicitor to elect, its action was error without injury, since the offense proved was the same concerning which the first witness was interrogated.

2. The defendant's wife was his clerk, and the improper sale of spirituous liquors by her, in the usual course of business, was a violation of the law, for which he may be punished.—*Commonwealth v. Gillespie*, 7 Serg. & R. 469–78; *Phelps v. Riley*, 3 Conn. 266; *Adams v. The People*, 4 Comstock, 173; *Schmidt v. The State*, 14 Missouri, 137; Wharton's Amer. Crim. Law, § 153.

BYRD, J.—1. The witness Peyton proved no fact tending to show that the prisoner sold any spirituous liquors in violation of law. His evidence, at most, tended to show that the accused had such liquors in his store, and that his wife was his clerk; and such evidence was admissible. For, if his wife was his clerk, and was authorized by him to sell

liquor in less quantities than a quart, he having no license, then the accused would have been guilty, if his wife, by virtue of his authority, had violated the law; and it is not essential that he should be present at the time of the sale. The court properly admitted the evidence of Peyton, and afterwards admitted the witness Grady to testify to the facts he did. The cases of *Elam v. The State*, (26 Ala.,) and *Cochran v. The State*, (30 Ala.,) are not in conflict with the ruling of the court below on this question.

2. The charge of the court is too broad. The mere fact that the wife was the clerk of the accused, and her violation of the law, did not authorize the jury to find the prisoner guilty. The jury should have been satisfied from the evidence, beyond a reasonable doubt, that the liquor was sold by the authority of the accused, in order to convict him. The evidence, all of which is set out in the record, did not authorize the court to give the charge therein set out. A principal is not liable criminally for the unlawful act of his agent or clerk, unless he participated in the act, or consented to it; and this participation or consent can not be presumed by the court or jury merely from the fact that the seller was the clerk of the accused.

Let the judgment be reversed, and the cause remanded, on the authority of *Patterson v. The State*, 21 Ala. 571; and *Nall v. The State*, 34 Ala. 262.

POMEROY vs. THE STATE.

[SCIRE FACIAS AGAINST DEFAULTING WITNESS.]

1. "Overruling" plea of *nul tiel record*; when exception is necessary.—A recital in the judgment-entry, that the plea of *nul tiel record*, to a *sci. fa.* against a defaulting witness, "was overruled," means that the issue on the plea was tried, and decided adversely to the defendant; and the appellate court cannot revise such decision, unless the evidence on which it was made is presented by bill of exceptions.
2. *Demurrer*; specification of grounds of.—A demurrer which does not

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specify any particular grounds of objection, as required by section 2253 of the Code, should be overruled; and this rule applies to proceedings against a defaulting witness in a criminal case.

3. *Sufficiency of sci. fa.*—In a *scire facias* against a defaulting witness in a criminal case, when its sufficiency is first assailed on error or appeal, it is only necessary that a substantial cause of action should be shown (Code, § 2405); and in considering the question of its substantial sufficiency, the appellate court will not indulge in presumptions against the pleader, nor construe ambiguous averments as on demurrer: if the judgment *nisi*, as copied into the *scire facias*, recites that the witness had been duly subpœnaed, in a case in which the State was plaintiff, this recital will be held sufficient to show that he was summoned in a criminal case, and that he was bound to appear at the term at which the forfeiture against him was taken.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. F. BUGBEE.

THE transcript in this case contains only the judgment *nisi*, the *scire facias* thereon, and the judgment final, which are in the following words:

“The State } May 17, 1864. Came the State, by the
vs. } attorney-general; and C. Pomeroy, a wit-
C.B.Smith. } ness subpœnaed on the part of the State,
being called to appear and testify, came not, but made default; and it appearing to the court that the subpoena issued in this behalf has been duly executed and returned, on motion it is considered by the court, that the State of Alabama, for the use of Montgomery county, recover of the said C. Pomeroy the sum of one hundred dollars, agreeably to the statute, unless he appear at the next term of this court, and show cause why this judgment should not be rendered final and absolute; and *sci. fa.* to issue accordingly.”

“The State of Alabama: To any sheriff of the State of Alabama, greeting. Whereas, at a circuit court held for the county of Montgomery, to-wit, at the spring term, 1864, the following order was made, and the following judgment entered,” &c., (setting out the judgment *nisi* as above copied,) “These are therefore to command you, that you make known the premises aforesaid to the said C. Pomeroy, that he be and appear at the next circuit court to be held for said county, at the place of holding the same,

on the third Monday in November, to show cause why said judgment should not be rendered final and absolute against him; and have you then and there this writ," &c. (Issued on the 30th May, 1864, and executed on the 22d October, 1864.)

"The State } Came the State, by its solicitor, and the
 } defendant by his counsel, who demurred to
 } the proceedings; which demurrer, being
 C. Pomeroy. } heard by the court, is overruled. The defendant then
 pleaded *nul tiel record*, which plea was also overruled; and
 it appearing that the *scire facias* issued in this behalf has
 been duly executed and returned, and that it was founded
 on a judgment rendered at the spring term, 1864, of this
 court, in words as follows," (setting out the judgment
nisi.) "It is therefore considered by the court, that said
 judgment be now rendered final, and that the State of
 Alabama, for the use of Montgomery county, recover of
 said C. Pomeroy the sum of one hundred dollars, together
 with the costs in this behalf expended."

The record does not show when the final judgment was rendered, except by a recital in the appeal bond that it was rendered at the fall term, 1865.

The following errors are now assigned: "1st, that the record does not show that a subpoena issued to the appellant; 2d, that it does not show the return of service of a subpoena on the appellant; 3d, that no subpoena is set forth in the record; 4th, that no subpoena, or averment, is set forth in the *scire facias*, in words or substance, showing that the defendant was required to appear at the term the judgment was taken; 5th, that the court erred in overruling the demurrer; 6th, that the court erred in overruling the plea of *nul tiel record*; 7th, that the record does not show the mandate of the subpoena, and the averment that the witness was called to appear and testify does not show that he was summoned to testify in this case; 8th, that the judgment *nisi* does not show the character of the case in which the witness was summoned: if a criminal case, the offense should have been set out in the judgment *nisi*."

MARTIN & SAYRE, for the appellant.

JNO. W. A. SANFORD, Attorney-General, *contra*.

A. J. WALKER, C. J.—We can not ascertain that there was error in overruling the plea of *nul tiel record*. We understand the assertion that the plea was overruled to mean, that the issue upon it was tried, and decided adversely to the defendant. The evidence upon which this decision was made is not presented to us by bill of exceptions, and we therefore are unable to revise it.

[2.] The demurer did not state any specific objection to the *scire facias*, and, therefore, was properly overruled, without regard to the merits or demerits of the *scire facias*. *Helvenstein v. Higgason*, 35 Ala. 259.

[3.] The sufficiency of the *scire facias* is to be determined from a point of view altogether different from that which would be adopted, if there had been a demurrer in such form as to demand consideration. The question arising first on error, the *scire facias* must be sustained, if it contain a substantial cause of action.—Code, § 2405. In ascertaining whether a pleading contains a substantial cause of action, we are to abstain from those presumptions against the pleader, when doubtful and ambiguous allegations are made, which are indulged on demurrer. Regarding the judgment *nisi*, which is copied into the *scire facias*, in the light of this principle, we hold that it contains a substantial cause of action. The most serious objection urged before us is, that the witness is not shown to have been subpoenaed, so as to have been bound to attend at the term when the forfeiture was taken. It appears very clearly that he was subpoenaed as a witness; that the subpoena was executed before the forfeiture, and that the subpoena was issued in the case of *The State v. Smith*, stated in the margin, to which the entries on the minutes must be referred. In the absence of a demurrer, making the objection in the court below, we will not presume, that the case of *The State v. Smith* was a civil action, but, on the contrary, we will presume it was a case on an indictment; and this being presumed, we must hold that the witness was under the statute bound to attend from day to day, and term to

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term, until the case was disposed of.—Code, § 3565. This distinguishes this case from *Emanuel v. Ketchum*, 21 Ala. 257. The judgment here was for the use of the county. This very clearly indicates that the case of *The State v. Smith* was a criminal cause, for it is in cases of that character that such judgments are rendered.—Code, § 3619.

The judgment is affirmed.

STEPHEN ET AL. (FREEDMEN) vs. THE STATE.

[INDICTMENT FOR GRAND LARCENY.]

1. *Act of December 15, 1865, as to punishment of grand larceny, arson, and burglary, held applicable only to future offenses.*—The act approved December 15, 1865, entitled “An act the more effectually to prevent the offenses of grand larceny, arson, and burglary.” (Session Acts, 1865–6, p. 116,) applies only to offenses committed after its passage, leaving prior offenses to be punished by the former laws.
2. *General criminal statutes applicable to freedmen.*—For offenses committed between the 20th July, 1865, (when the provisional governor issued a proclamation, declaring the civil and criminal laws of the State, “as they stood on the 11th day of January, 1861, except that portion which relates to slavery, to be in full force and operation,”) and the 22d September, 1865, (when an ordinance was passed by the convention, by which slavery was declared to be abolished and prohibited,) freedmen are amenable to the general criminal statutes applicable to other persons.
3. *Abstract charge.*—A charge which is abstract, is properly refused.

FROM the Circuit Court of Jefferson.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case was found at the September term, 1865, and charged that, before the finding thereof, “Stephen, a freedman, formerly the property of James McAdory, and Tom, a freedman, formerly the property of Alexander L. McLaughlin, feloniously took and carried away twelve bushels of wheat, the personal property of James McAdory, of the value of more than twenty dollars.” The

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defendants were tried at the spring term, 1866, and severally pleaded not guilty. The verdict of the jury was, "We, the jury, find the defendants guilty, in manner and form as charged in the indictment, and assess the value of the wheat alleged to be stolen at twenty-four dollars"; and the court thereupon sentenced each of the defendants to imprisonment in the penitentiary for two years. "On the trial," as the bill of exceptions states, "it appeared in evidence, among other things, that the offense was committed on the 15th August, 1865. The prisoners thereupon requested the court to instruct the jury, that there was no statute law in existence, either at that time, or at the present, to which they were amenable; also, that the prisoners, if they were found guilty as charged in the indictment, were not amenable to the common law; which charges the court refused, and the defendants excepted to their refusal."

The prisoners moved in arrest of judgment, on the following grounds: "1st, because the indictment is not authorized by the evidence; 2d, because there was no law of force at the time of the commission of the supposed offense, to which the prisoners were amenable; 3d, because the court can not pass sentence on the prisoners in pursuance of the verdict; 4th, because the common law is of no force, except in misdemeanors; 5th, because, at the time of the supposed offense, there was no standard of value as to money in the country; 6th, because the value of the wheat is in excess of the value proved, according to the evidence of the prosecutor; 7th, because there is no evidence of more than five bushels of wheat having been stolen by the prisoners on the same night; 8th, because there was no proof that Stephen was ever the property of James McAdory, or that Tom was ever the property of Alexander L. McLaughlin; 9th, because the indictment is defective, since it contains no definite allegation as to the value of the wheat, and because it contains no allegation of either time or place." The court overruled the motion in arrest, and the record does not show that any exception was reserved to its ruling.

W. R. SMITH, for the prisoners.

JNO. W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—The indictment is in conformity to the provisions of the Code, and substantially the same in form as the one prescribed therein for grand larceny as punished by section 3173. The verdict and judgment are responsive to the indictment and the law, and therefore correct.—*Moore et al. v. The State*, at present term. The record affirmatively shows that the prisoners were present in person at the trial and sentence, the latter succeeding the former without any interval.

[1.] The act of the 15th December, 1865, (Pamph. Acts, p. 116,) did not repeal section 3173 of the Code, as to the ingredients of the crime or punishment of grand larceny, as to offenses committed before its passage.—*Miles v. The State*, *Moore v. The State*, and other cases decided at the present term.

[2.] The court properly refused to give the first charge asked.—*Jeffreys et al. v. The State*, and *Eliza v. The State*, at the last term.

[3.] The second charge asked was abstract; and, therefore, properly refused.

The record does not purport to set out all the evidence on the trial, and we can see no error in the ruling of the court on the motion in arrest of judgment.

There is no error in the record, and the judgment must be affirmed.

DAVID (A FREEDMAN) vs. THE STATE.

[INDICTMENT FOR LARCENY OF MULE.]

1. *Punishment of horse-stealing; what is revisable.*—Under the act approved October 7, 1864, entitled "An act to punish certain offenses therein named," (Session Acts, 1864, p. 19,) the punishment of horse-stealing was death, or imprisonment in the penitentiary, at the discretion of the jury; and where the latter punishment is imposed by the jury, the appellate court can not revise their action, on the ground that the term prescribed is excessive.

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2. *Proof of venue.*—A charge to the jury, which is stated to have been given “amongst other charges,” to the effect “that, if they should find the defendant guilty as charged in the indictment, and that the offense was committed about the 1st November, 1865, then the defendant was liable to punishment under the act of October 7, 1864,” is not objectionable as authorizing a conviction without proof of the venue. (BYRD, J., *dissenting.*)

FROM the Circuit Court of Tuscaloosa.
Tried before the Hon. WM. S. MUDD.

THE indictment in this case, which was found at the special November term, 1865, described the prisoner as a “free person of color,” and charged that he “feloniously took and carried away a mule, the property of Joseph B. Eddins.” “On the trial,” as the bill of exceptions states, “besides other evidence tending to convict the defendant as charged in the indictment, there was evidence showing that the mule charged to have been taken was stolen on or about the 1st November, 1865; and the court charged the jury, amongst other charges, that if they should find the defendant guilty as charged in the indictment, and that the offense was committed about the 1st November, 1865, then the defendant was liable to punishment under the act of the 7th October, 1864, entitled ‘An act to punish certain offenses therein named’; which act was read by the court to the jury; to which charge of the court the defendant excepted.” The jury returned a verdict of “guilty in manner and form as charged in the indictment,” and sentenced the prisoner to confinement in the penitentiary for ninety-nine years; and the court pronounced judgment accordingly.

W. R. SMITH, for the prisoner.

JNO. W. A. SANFORD, Attorney-General, *contra.*

JUDGE, J.—It is contended that the term of imprisonment in the penitentiary, imposed in this case, was excessive, and not justified by the law. It is a sufficient answer to this objection to say, that the law governing the case vested the jury with discretionary power, as to the term of imprisonment to be imposed, and that we have no authority

to revise the action of the jury in the exercise of that discretion.—See *White v. The State*, 30 Ala. 518.

2. Our first impression of this case was, that the charge of the court excepted to authorized the jury to find the defendant guilty, without any proof that the offense was committed within the county in which the indictment was found. A subsequent examination, however, has convinced a majority of the court, that this view is not sustained by the record. We judicially know there were two statutes, one or the other of which was applicable to the case of the prisoner, if found guilty; and that the application of the one or the other depended upon the *date* of the commission of the offense. These statutes were, section 3180 of the Code, and the act of the 7th October, 1864.—Session Acts, p. 19. The punishment of the offense for which the prisoner was indicted, under the former, was imprisonment in the penitentiary, to be fixed by *the court*; under the latter, the punishment was death, or imprisonment in the penitentiary, at the discretion of *the jury*. The court, "*amongst other charges*," instructed the jury, "that if they should find the defendant guilty as charged in the indictment, and that the offense was committed about the 1st of November, 1865, then the defendant was *liable to punishment* under the act of the 7th of October, 1864, entitled 'An act to punish certain offenses therein named'; which act was read by the court to the jury." This charge embraced *no constituent of the offense*, as necessary to be proved before the jury could find the prisoner guilty. Had this been undertaken by the court, and the question of venue been ignored, then, under repeated decisions of this court, the charge would have been erroneous. But the charge related exclusively, if the defendant should be found guilty, to the date of the commission of the offense, and the punishment to be inflicted, if the case should come under the influence of the act of the 7th of October, 1864.

But it may be said that the words, "if the jury should find the prisoner guilty *as charged in the indictment*," authorized a finding of guilty without proof of venue, because there was no averment of venue in the indictment. This position is untenable, because, to find the prisoner guilty

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"as charged in the indictment," proper proof of venue would have to be made; and the presumption must not be indulged that the court used these words, when there was no proof of venue, in the absence of anything in the record going to show such to have been the fact; for we are not authorized to impute error to the court, when it does not affirmatively appear. We must construe the verdict of the jury the same way, for the language of that is, "We find the defendant guilty in manner and form *as charged in the indictment.*"

The terms of the charge can not, in our opinion, be construed to have erroneously ignored the question of venue.

We can find no error in the record, and the judgment of the circuit court is affirmed.

BYRD, J., not concurring, and adhering to the first impression of the court.

ROBIN (A FREEDMAN) vs. THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. *Asking prisoner, on conviction, if he has aught to say in arrest of judgment.*—It is not necessary, in a case of felony, that the record should affirmatively show that the prisoner was asked by the court, before sentence was pronounced against him, if he had anything to say in arrest of judgment: the question will be presumed to have been asked, unless the record affirmatively shows that it was not.
2. *Motion in arrest of judgment; presumption in favor of judgment.*—When no exception is reserved to the overruling of a motion in arrest of judgment, and the record does not set out the evidence on which the motion was founded, the appellate court will presume that the motion was properly overruled.

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case contained two counts, each describing the prisoner as "a freedman of color;" the first

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charging that he "unlawfully, and with malice aforethought, did assault one Joseph W. Gillem, with the intent to murder him"; and the second, that the assault was made "with a stick and an axe," and "with the intent to kill and murder." The defendant pleaded not guilty, and issue was joined on that plea. The jury returned a verdict of guilty in manner and form as charged in the indictment. After conviction, the defendant moved in arrest of judgment, on the following grounds: "1st, that the verdict was contrary to law and the evidence; 2d, that the verdict was contrary to the charge of the court; 3d, that the evidence disclosed the fact that the assault was really committed by the prosecutor, and not by the defendant." The court overruled the motion, and sentenced the defendant to imprisonment in the penitentiary for the term of three years. There is no bill of exceptions in the record, and the cause is brought up by writ of error. The errors assigned are—"1st, that the verdict and judgment are illegal; 2d, that the indictment is defective."

W. R. SMITH, for the prisoner.

JNO. W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—The indictment was found at a special term of the circuit court of Tuskaloosa county, held on the 27th November, 1865. There is no bill of exceptions, and the cause is brought here on writ of error. The first count in the indictment is good. The verdict is general. The proceedings are regular, unless the failure to ask the prisoner, before sentence, what he had to say why the sentence of the law should not be pronounced, is erroneous; and this question is settled adversely to the defendant in the case of *Aaron & Ely v. The State*, at the last term, and authorities there referred to.

[2.] The defendant made a motion in arrest of judgment, and set up several distinct and sufficient grounds; but there is no bill of exceptions setting forth any evidence to support them, nor any exception to the ruling of the court on the motion. In this condition of the record, we must

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presume that the court acted correctly in overruling the motion.—See *Paris v. The State*, 36 Ala. 232.

As there is no error in the record, let the judgment be affirmed.

WADE ET AL. (FREEDMEN) vs. THE STATE.

[INDICTMENT FOR GRAND LARCENY.]

1. *Act of December 15, 1865, as to punishment of grand larceny, arson, and burglary, held applicable to future offenses only.*—The act approved December 15, 1865, entitled “An act the more effectually to prevent the offenses of grand larceny, arson, and burglary,” (Session Acts, 1865–6, p. 116,) applies only to offenses committed after its passage, and leaves prior offenses to be punished under the former laws.
2. *Severance of trial.*—Where several persons are jointly indicted for a felony, they can not claim separate trials as matter of right; but the court may, in its discretion, grant or refuse a severance.

FROM the Circuit Court of Bibb.

Tried before the Hon. B. F. SAFFOLD.

THE indictment in this case was found at the October term, 1865, and charged that, before the finding thereof, “Wade, a freedman of color, John, a freedman of color, and By, *alias* Bias, a freedman of color, feloniously took and carried away a bag of cotton, the property of one W. T. Cobb, of the value of more than twenty dollars.” At the April term, 1866, when the case was called for trial, the defendants asked a severance—“1st, because they show that, in the selection of jurors, they would be greatly prejudiced by being tried jointly; 2d, because they would be greatly prejudiced in the examination of witnesses by being tried jointly; 3d, because they have separate defenses, which they cannot make jointly without introducing complication and confusion in the case, to their detriment; 4th, because they cannot have a fair and impartial trial, unless

they are tried separately." The court refused to grant a severance, and the defendants excepted to its refusal.

The defendants demurred to the indictment, on the ground that the law which was of force at the time the alleged offense was committed, and at the time the indictment was found, had been repealed by the act approved December 15, 1865, entitled "An act the more effectually to prevent the offenses of grand larceny, arson, and burglary"; and that the latter act contained no saving clause as to prior offenses. The court overruled the demurrer, and the defendants excepted. The defendants then pleaded not guilty, and a pardon under the governor's proclamation, "in short by consent;" and issue was joined on these pleas. The jury returned a verdict of guilty, and assessed the value of the stolen property at two hundred dollars; and the court thereupon sentenced each of the defendants to imprisonment in the penitentiary for two years.

After conviction, the defendants moved in arrest of judgment, "1st, because there was no law under which they could legally be punished; 2d, because the court erred in overruling the demurrer to the indictment; 3d, because the court erred in refusing to grant a severance of their trials; and, 4th, because the verdict was contrary to law." The court overruled the motion in arrest, and the defendants reserved an exception to its action. There is no formal bill of exceptions in the record, the several exceptions above mentioned being stated in the minute-entries by the clerk.

LOCKETT, BRAGG & LOCKETT, for the prisoners, contended, that the act approved December 15, 1865, entitled "An act the more effectually to prevent the offenses of grand larceny, arson, and burglary," being repugnant to the former laws on the same subject, by necessary implication repealed those laws; and there being no saving clause in that act, as to prosecutions for offenses committed prior to its passage, there could be no conviction or punishment in such cases. They cited the following authorities: *Jordan v. The State*, 15 Ala. 746; *Stewart George v. Skeates & Co.*, 19 Ala. 741; *Bartlett v. King*, 12 Mass. 545; *Nichols v.*

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Squire, 5 Pick. 168; *Commonwealth v. Cooley*, 10 Pick. 39; *Commonwealth v. Marshall*, 11 Pick. 350; *Commonwealth v. Kimball*, 21 Pick. 373; *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach, 306; *United States v. Preston*, 3 Peters, 57; *Britton v. Commonwealth*, 1 Cush. 302; *Buckalew v. Ackerman*, 3 Halst. 40; 4 Pick. 23; 1 Binney, 601; Sedgwick on Const. & Stat. Law, 124, 125, 130, 131; *Adams v. Ashley*, 2 Bibb, 96; *Moore v. Vance*, 1 Ham. 10; 4 Wash. C. C. 691; *United States v. Irwin*, 5 McLean, 178; *Regina v. Salisbury*, 2 Queen's Bench R. 72, 84; *Sullivan v. The People*, 15 Ill. 233; *Hirschfelder v. The State*, 19 Ala. 112; *Davis v. Fairbairn*, 3 How. U. S. 636; *State v. Seaborn*, 4 Dev. 305; 1 Scammon, 80; 16 Barbour, 15, 18; *Smith v. State*, 14 Missouri, 147; *State v. Whitworth*, 8 Porter, 434; *Smith v. The State*, 1 Stewart, 506; *Lore v. The State*, 4 Ala. 177; *Wyman v. Campbell*, 6 Porter, 219; *State v. Andrews*, 20 Texas, 230; 6 Wendell, 526; 1 Hill, N. Y. 324; 2 Dana, 331; 6 Cranch, 329; 4 Moore & P. 341; *Freeman v. The State*, 6 Porter, 372; *The State v. Allaire*, 14 Ala. 435; *Broughton v. Br. Bank*, 17 Ala. 828.

JNO. W. A. SANFORD, Attorney-General, *contra*, relied on the case of *Miles v. The State*, at the present term, (*ante*, p. 39,) and the authorities there cited by him; and as to the right of severance, he cited *The State v. Hawkins*, 9 Ala.

JUDGE, J.—The principal question involved in this case was decided at the present term in the case of *Miles v. The State*. The opinion was delivered in that cause before the argument of this; and it is contended that the decision there rendered, as to the repealing effect of the act of December 1865, is erroneous. We have carefully re-examined that opinion, and the doctrine on which it rests; and have also carefully examined the authorities cited on the brief of counsel in the present case; and feel constrained to adhere to our former conclusion, not doubting its correctness. The act of 15th December, 1865, repeals the prior statutes providing for the punishment of the offenses in said act severally named, as to future offenses only.

[2.] It is settled in this State, that when several persons

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are jointly indicted for a felony, they cannot claim separate trials as a matter of right; but that the court may, in its discretion, allow them to be tried separately.—*Hawkins v. The State*, 9 Ala. 137.

There is no error in the record, and the judgment is affirmed.

EP PARTE POLLARD, AND EX PARTE WOODS.

[APPLICATIONS FOR MANDAMUS TO CITY COURT.]

1. *Constitutionality of "act to regulate judicial proceedings," approved Feb. 20, 1866, as impairing obligation of contracts, and delaying justice.*—The first and eighth sections of the act approved February 20, 1866, entitled "An act to regulate judicial proceedings," (commonly known as the "stay-law,") which postpone the rendition of judgment for at least twelve months, are not, in their operation on pre-existing contracts, violative of the constitutional provision against laws impairing the obligation of contracts, nor of the fourteenth section of the bill of rights, which declares that "all courts shall be open," and that right and justice shall "be administered without sale, denial, or delay." (WALKER, C. J., *dissenting* on the first point, held the whole law unconstitutional and void.)
2. *Same, as affected by constitutional provisions as to title, subject-matter, and form.*—The provision of the fifth section of said act, which prohibits sales by mortgagees without actual possession of the property, not being in any sense a regulation of judicial proceedings, is violative of the second section of the fourth article of the constitution, which requires that the subject-matter of the act "shall be distinctly stated in the title;" but the unconstitutionality of this section does not affect the validity of the other provisions of the act, which are appropriately described in the title; nor is said act, though in effect amendatory of other general laws, violative of that provision of said second section of the fourth article of the constitution, which requires that "the law or section revised or amended shall itself be set forth at full length" in the amendatory act.

APPLICATIONS for the writ of *mandamus* to the City Court of Montgomery, Hon. B. S. BIBB presiding. The two cases were argued and submitted at the last term of the court, and were held under advisement until the present term. In

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Ex parte Pollard, the petitioner, as surviving partner of the late firm of Thiess & Pollard, instituted an action in said city court, on the 9th January, 1866, against William Falconer; and the summons was duly executed on the 10th January. On the 26th February, 1866, a day of the regular February term of said court, when the cause was reached in its order on the docket, "the plaintiff moved for a judgment, because the defendant has failed to plead to the complaint; but the court overruled the motion, and refused to take any action in said cause, because, by the terms of the law passed at the late session of the legislature, entitled 'An act to regulate judicial proceedings,' such cases as this can not be tried at the term to which the summons is made returnable, notwithstanding the summons and complaint have been served on the defendant more than twenty days before the sitting of the court; and the court refused, for these reasons, to take any action in said cause." The plaintiff duly reserved a bill of exceptions to the overruling of his motion, and applied to this court for a *mandamus* to said city court, to compel it to render judgment as asked.

In *Ex parte Woods*, a judgment was rendered against the petitioner by said city court, on the 6th day of September, 1860; and on the 10th March, 1866, an execution was issued on said judgment, and was levied on his lands. The petitioner thereupon made a suggestion in writing to the sheriff, that there was an illegality or irregularity in the execution, and, having paid the costs due to the officers of court, requested that the execution might be returned "stayed by suggestion under the statute." The sheriff refused to comply with the request, "on the ground that there is no law authorizing the same," and notified the defendant that he should proceed to sell the land under the execution. The defendant then applied by petition to said city court, "for the writ of *mandamus*, or other appropriate writ or order, to be issued to the said sheriff, commanding and requiring him to refrain from further proceedings under said execution, and to return the same 'stayed by suggestion under the statute'." The city court refused the application, "on the ground that the provisions of the act to regulate judicial proceedings, so far as they relate to executions, are uncon-

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stitutional and void;" and the petitioner thereupon renewed his application to this court.

The act approved February 20th, 1866, entitled "An act to regulate judicial proceedings," the constitutionality of which is involved in these cases, is in the following words:

"SEC. 1. *Be it enacted*," &c., "That in all suits commenced since the first day of May, 1865, or hereafter commenced, in this State, the first term of said court after the commencement of said action shall be deemed and held the return term only; the second term, an appearance and pleading term; and no such action shall be tried before the term next after the appearance term thereof.

"SEC. 2. *Be it further enacted*, That when any levy shall be made, or has been made, under any execution, (except for taxes and debts due the State,) any defendant therein, upon delivering to the officer holding such execution a written suggestion that there is some irregularity or illegality in the execution, or in its issue, or in the proceeding under it, and shall pay the costs due the officers of court upon the same, (sheriff's commissions not included,) shall have the right to give bond in double the amount of property levied upon, (if personal property,) to be ascertained by the officer levying the same, and approved by him, payable to the plaintiff, and conditioned to deliver the said execution (?) or pay to the amount of the value of said property, as ascertained by said officer, if said suggestion shall be determined against the said defendant; and when the levy is upon land or real estate, the defendant shall be allowed to make and have the said suggestion without any bond. The said suggestion and bond shall operate as a *supersedeas*, and shall be returned with the execution to the court to which said execution is returnable, with an endorsement on the execution to this effect, to-wit: If levied on real estate, "stayed by suggestion under statute," and if on personal property, "stayed by suggestion and bond under the statute." The court to which such return is made shall try any issue made up as to the truth of such suggestion. If the suggestion is established as true, the court shall enter judgment, amending the defect or defects which may be shown, at the cost

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of the plaintiff in execution, and declaring the bond, if levied on personal property, to have the force and effect of a judgment, against all the obligors therein, at the cost of the defendant in execution and his securities, for the amount of the value of the property levied upon, as fixed by the officer taking the said bond, if the said property levied upon shall not be delivered according to the condition of said bond, as provided by this section; and if the issue shall be determined against the defendant, judgment shall be entered against him and the securities as above provided; and when said levy is upon land, and the said suggestion is established as true, then the defect or defects shall be amended at the cost of the plaintiff, and if not established as true, then judgment shall be entered up against the defendant for cost. From any such judgment either party may take an appeal within six months, either to the circuit or supreme court, upon giving an appeal bond in double the amount of the execution, payable to the appellee, with sufficient security, and with condition to prosecute the appeal to effect, and satisfy such judgment as the appellate court may render in the premises; which bond may be approved by the judge, clerk, or register of the court from which the appeal is taken, and shall operate as a *supersedeas*: *Provided*, that all the provisions of this section shall apply to executions or orders of sale issued in cases commenced by attachment, or in which attachments may have been, or may hereafter be issued, as fully as to an execution issued in any other kind of a case.

“SEC. 3. *Be it further enacted*, That when the defendant shall make a suggestion and give bond under the second section of this act, and the execution is returned, with the endorsement, to the court, said suggestion shall not be tried at that term of the court, unless by consent of the parties, but shall stand continued over until the next term of the court.

“SEC. 4. *Be it further enacted*, That if the defendant in execution, on any judgment now existing, shall pay, on or by trial term of said suggestion, one-third of the principal and interest, together with all cost due thereon, said cause shall stand continued until the next term of said court.

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“SEC. 5. *Be it further enacted*, That in case any deed of trust, or mortgage with power of sale, has been, or may be executed in this State, to secure the payment of any debt or debts, it shall not be lawful for the trustee or creditor named in such deed or mortgage to sell any property so conveyed, without having actual possession thereof, so as to deliver the same to the purchaser upon making said sale. And in the event the grantor in any such deed of trust, or mortgage with power of sale aforesaid, shall fail or refuse to deliver, on demand, possession of any property or estate so conveyed, after having made default in payment of the debt thereby secured, it shall be lawful for the trustee or creditor claiming to have legal title to sue for the possession of the same; and if personal property, the sheriff, upon suit being brought, and affidavit of title, as in detinue cases, as provided by the Code, with the same terms and conditions as therein provided, shall take bond for the delivery of the property as provided by said Code in such detinue cases.

“SEC. 6. *Be it further enacted*, That, hereafter, justices' courts in this State, for the trial of civil causes, shall be held semi-annually, at such times and places as the justices in each beat may appoint, and may continue from day to day until the business is disposed of; and the term to which any original process, summons, warrant, or complaint shall be made returnable, shall be deemed and held the docket term, or appearance term of said court, and the cause shall stand for trial at the next ensuing term thereafter; and on all judgments rendered by any justice, in any civil cause, the party or parties against whom such judgment may be rendered shall, at any time thereafter, and before the payment of the same, have the right of appeal to the next term of the circuit court of the county in which such judgment may be rendered, upon giving such appeal bond, with surety, as is now required by the law; and the term to which such appeal may be taken shall be the return term thereof, and the next succeeding term shall be the trial term thereof; and in no case shall a county tax be charged on such appeal, unless the expense of a jury trial be incurred; nor shall any damages over and above the debt and interest in any

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case be allowed. Justices of the peace shall make their executions returnable to the regular semi-annual term next after the rendition of any judgment. The above right of appeal shall apply to any and all judgments in said justices' courts now existing, as well as those which may hereafter be rendered, and all judgments and executions in justices' courts shall be subject to the suggestion and proceedings provided for in section 2d of this act.

"SEC. 7. *Be it further enacted*, That the provisions of this act shall not apply to proceedings in the courts of admiralty, nor to any action in detinue, or forcible entry and detainer, or unlawful detainer.

"SEC. 8. *Be it further enacted*, That in all cases of suits brought in city courts having civil jurisdiction, and where terms are held oftener than twice in each year, no judgment shall be obtained within a shorter period of time than is prescribed in the 1st section of this act. But the return, appearance and judgment terms, on suits brought in such courts, must each be intervened by a space of, at least, six months.

"SEC. 9. *Be it further enacted*, That all laws and parts of laws contravening the provisions of this act be, and the same are hereby repealed: *Provided*, that this act shall not so operate as to repeal or destroy any lien of any judgment, decree, or execution now in existence, or the lien of any judgment or decree that may be substituted under the laws of this State authorizing the substitution of lost or burnt records."

WATTS & TROY, and GEO. GOLDTHWAITE, for the petitioner Pollard, and against the petitioner Woods.

P. T. SAYRE, *contra*.

JUDGE, J.—These cases relate to different sections of the act to regulate judicial proceedings, approved February 20th, 1866. *Ex parte Pollard* relates to the first and eighth sections of the act, and *Ex parte Woods* to the second, third and fourth sections. Both cases will be considered together.

Section 10 of article I of the constitution of the United

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States provides, that no State shall pass any law impairing the obligation of contracts. There is a distinction between the obligation of a contract, and the remedy given to enforce that obligation. The obligation is the law which binds the parties to perform their agreement, according to its essence, nature, construction, and extent. The remedy is the means employed to enforce the obligation. The law which confers the right, inheres in, and follows the contract, wherever it may go. The remedy is dependent on the local legislation of the place where the parties seek to enforce the right. In the language of Chief-Justice Marshall, "They originate at different times. The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a pre-existing obligation."—*Ogden v. Saunders*, 12 Wheaton, 335.

The doctrine that the remedy is grafted into the contract, was held by Mr. Justice Johnson, in the case above cited, to be untenable, and restrictive of State powers. He said: "If the remedy enters into the contract, then the States lose all power to alter their laws for the administration of justice." In the same case, he said further: "The law of the contract remains the same everywhere, and it will be the same in every tribunal; but the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each State severally." To hold the contrary, would make the obligation, as has been aptly said, "ambulatory and uncertain, and mean a different thing in every State in which it may be necessary to enforce the contract." It would produce a "motley, multi-form administration of laws."—*Hawkins et al. v. Barney's Lessee*, 5 Peters, 457.

In the early discussions of this question, it was contended that, if the obligation and the remedy were not identical, the union between them was so intimate, that legislation could scarcely touch the latter without affecting the former. Chief-Justice Marshall, in *Ogden v. Saunders*, thus states the position, and the answer to it: "But, although the iden-

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tity of obligation and remedy be disproved, it may be, and has been urged, that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation; that they live, languish, and die together. The use made of this argument, is to show the absurdity and self-contradiction of the construction which maintains the inviolability of the obligation, while it leave the remedy to the State governments. We do not perceive this absurdity or self-contradiction. Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent governments, over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the obligation is distinct from the remedy; and it would seem to follow, that a law might act on the remedy without acting on the obligation."

The same position is contended for at this day, as it was in the day of Chief-Justice Marshall; and it is said there has, of late, been a tendency in the courts of the United States to render the distinction between the obligation and the remedy to a great extent inoperative. This tendency to a "distinction without a difference," it is said, is shown by the later decisions on the subject, of the highest judicial tribunal of the Union, commencing with *Bronson v. Kinzie*, 1 Howard, 315.

We propose to notice briefly the principal decisions indicated, to ascertain if any such conclusion can be legitimately drawn from them; and we premise by saying, it is a general rule, that the positive authority of a decision is co-extensive only with the facts on which it was made.

In *Bronson v. Kinzie*, the adjudication was upon two statutes of the State of Illinois, one of which declared that the equitable estate of a mortgagor should not be extinguished for twelve months after a sale under a decree in chancery; and the other, that no sale of the property should be made, unless it would bring two-thirds of its valuation, according to the appraisement of three householders. As regarded

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mortgages made prior to their passage, these acts were held to be unconstitutional; the first, for the reason that it gave to the mortgagor and to the judgment-creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract, which new interests were directly and materially in conflict with those which the mortgagee acquired when the mortgage was made; and the second, because its effect was to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible; and because, further, it was not a general law, but confined to judgments rendered, and contracts made, prior to the first of May, 1841, (the act having been passed on the 27th February of that year,) by which it was made to operate mainly on past contracts, and not on future.

In this case, Chief-Justice Taney, in delivering the opinion of the court, said: "If the laws of the State, passed afterwards, had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a State may regulate, at pleasure, the modes of proceeding in its courts in relation to its past contracts, as well as future." He said further: "Whatever belongs merely to the remedy, may be altered according to the will of the State; provided the alteration does not impair the obligation of the contract."

McCracken v. Hayward (2 Howard, 609): In this case, the identical statute last above named, in its application to a sale under an execution in a suit at law, came again under review, and was again pronounced unconstitutional and void as to contracts made prior to its passage. The court held, that if the power existed at all in a State legislature to prohibit a sale in such case, it might be carried to any extent; it might prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds; which would be exercising uncontrollable discretion in passing laws relating to the remedy, regardless of the effect on the obligation of contracts.

It has been contended that Mr. Justice Baldwin, in de-

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livering the opinion of the court in this case, used language which gives countenance to the idea of a tendency on the part of the court to hold the remedy so intimately connected with the obligation as to be, in many respects, a part of it; and consequently to prohibit, to a great extent, State legislation upon the remedy. As regards the cases of *Bronson v. Kinzie*, and *McCracken v. Hayward*, we adopt the language of the court of appeals of the State of New York, in *Morse v. Goold*, 1 Kernan, 292. Judge Denio, in delivering the opinion of the court, after saying that in both the cases the statute of Illinois was, in his opinion, rightfully held to impair the obligation of the contract, used this language: "I do not understand either of the cases to determine that the law respecting legal procedure, in existence when the contract was made, can not be changed in such a manner as to operate upon existing contracts. In the able and discriminating opinion of Chief-Justice Taney, in the first case, the [right to make such *changes* is distinctly asserted; and if the opinion in *McCracken v. Hayward* holds the contrary, it was unnecessary to go that length, and the doctrine would be hostile to the principle of several prior cases, and an unwarrantable restriction upon the powers of the State governments."

Grantley's Lessee v. Ewing (3 Howard, 307): In this case, a statute of the State of Indiana was in question. After an execution had been issued on a decree of foreclosure of a mortgage, requiring the "mortgaged premises to be sold as other lands are sold on execution," an act was passed by the legislature, which provided that thereafter no property should be sold on execution for less than one-half of its cash value at the time of sale, to be ascertained by three freeholders at the instance of the officer. This act was held to be unconstitutional as to pre-existing contracts. The court said: "If the legislature could make this alteration in the contract, and in the decree enforcing it, so it could declare the property should bring its entire value, or that it should not be sold at all, thereby impairing the obligation under the disguise of regulating the remedy."

The Planters' Bank of Mississippi v. Sharp et al. (6 Howard, 327): In this case, there was involved the constitution-

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ality of an act of the legislature of the State of Mississippi, which prohibited any bank in the State from transferring by endorsement, or otherwise, any note, bill receivable, or other evidence of debt; and provided that, if it should appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same had been transferred, the action should abate upon the plea of the defendant. The right was given to the bank in its charter to discount bills of exchange and notes, and to make loans, &c.; and in the course of business under its charter, the bank discounted and held promissory notes. It was held, that this act vitally changed the obligation of the contract between the makers of such notes and the bank to pay them to any assignee thereof, as well as changed the obligation of the other contract between the State and the bank, in the charter, to allow such notes to be taken and transferred. Mr. Justice Woodbury, in delivering the opinion of the court, said: "Laws are referred to, which are upheld, and which affect the whole community, and seem to violate some of the important incidents of contracts between individuals, or between them and corporations. But it will usually be found that these are such laws only as relate to future contracts, or, if to past ones, relate to modes of proceeding in courts, or to the form of remedy merely."

Curran v. The State of Arkansas et al. (15 Howard, 304): The legislature of Arkansas incorporated the Bank of Arkansas, with the usual banking powers, the State being the sole stockholder; the bank went into operation, issued bills, and suspended specie payments; subsequently the legislature passed several acts, the effect of which was to withdraw the assets of the bank, and appropriate them to different purposes, for the benefit of the State. The court held, (the bills of the bank being payable on demand,) that there was a contract with the holder to pay them, and that the laws withdrawing the assets into a different channel, and leaving the bill-holder unprovided for, impaired the obligation of the contract.

Howard v. Bugbee (24 Howard, 461): In this case, a statute of the State of Alabama, authorizing the redemption of mortgaged property, by *bona-fide* creditors of the mortga-

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gor, in two years after the sale under a decree, was declared to be unconstitutional and void, as to sales made under mortgages executed prior to the date of its enactment, as impairing the obligation of the contract. This decision was based, mainly, on the authority of *Bronson v. Kinzie*. The statute pronounced upon changed the legal effect of the mortgage, by giving an estate, which before had no existence, to *bona-fide* creditors of the mortgagor, to continue for two years; and this brought the case directly within the influence of *Bronson v. Kinzie*.

We think it may be legitimately deduced from these and other decisions of the same court —

1. That the distinction between the obligation and the remedy clearly exists, and is fully operative.

2. That it is consequently in the power of the State legislature to regulate the remedy and modes of proceeding, in relation to past, as well as future contracts.

3. That this power is subject only to the restriction that it cannot be exercised so as to take away all remedy upon the contract, or to impose upon it new burdens and restrictions which materially impair the value and benefit of the contract.

4. And that, although almost every law providing a new remedy affects and operates upon causes of action existing at the time the law is passed, and may make the recovery of debts more tardy and difficult than the old one; yet *the obligation and the remedy being distinct*, it will not follow that the law is unconstitutional.—Sedg. Stat. & Con. Law, 659; *Sturges v. Crowninshield*, 4 Wheaton, 122; *Mason v. Haile*, 12 *ib.* 370; *Green v. Biddle*, 8 Wheaton, 84; *Ogden v. Saunders*, 12 Wheaton, *supra*; *Jackson v. Lamphire*, 3 Peters, 280; *Hawkins v. Barney's Lessee*, 5 Peters, 457; *United States v. Sampeyrac*, 7 Peters, 222; and cases before cited.

In the exercise of the power to legislate on the remedy, the chief difficulty lies in drawing, with precision, the line between the right and the remedy. Such a line, one that would be applicable in all cases, has not been drawn by the supreme court of the United States. On the contrary, the statute before it in each case seems to have been tested

by its own particular provisions. Legislation of this character assumes so many different phases, that we think this the only safe and proper course to be pursued; applying at the same time the test of previous decisions and of principle. We shall not, therefore, undertake, in advance of that high tribunal, to deduce a rule from its decisions, not prescribed by itself, by which all cases are to be squared; especially when the effect would be to abridge the sphere of necessary and wholesome State legislation, beyond what it can for a moment be believed was ever contemplated in the formation of the constitution.

We will now proceed to the consideration of the sections of the act before us.

The first section is as follows: "That in all suits commenced since the first day of May, 1865, or hereafter commenced, in this State, the first term of said court, after the commencement of said action, shall be deemed and held the return term only; the second term, an appearance and pleading term; and no such action shall be tried before the term next after the appearance term thereof."

The eighth section, in effect, provides, that when the terms of the city courts are held oftener than twice in each year, no judgment shall be obtained in said courts within a shorter space of time than is prescribed in the first section of the act; and that six months shall intervene between the return, appearance, and judgment terms each, of said courts.

Since the organization of the State, at least two sessions of the circuit court have been required to be held, in each year, in every county in the State; and they are usually intervened by a space of six months.

In December, 1820, the legislature enacted: "That it shall be lawful in all actions of debt, *assumpsit*, and covenant, to take judgment at the return term thereof; but the defendant may, upon filing a plea to the merits, have the suit continued."—Toulmin's Digest, 487. The result was, that in every case where a defendant desired a continuance, he obtained it by filing a plea to the merits, whether he had a meritorious defense or not. Thus continued the law until 1839, when it was provided by statute, that in all suits

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for the collection of money, no judgment should be rendered at the appearance term, except by the consent of parties, from the failure of defendant to plead, or enter an appearance.—Clay's Digest, 334, § 115. On the 17th of January, 1853, the Code of Alabama went into operation; which provides for the commencement of civil actions by service of a summons; if the summons is issued less than three days before the term of the court next thereafter, it must be made returnable to the next succeeding term after that; if executed twenty days or more before the return day thereof, it is required to be returned within five days after its execution, to be placed on the trial docket, and to stand for trial at the first term, unless good cause be shown for a continuance.—Code, §§ 2166-7, 2257. And thus stood the law, when the act before us was passed.

Thus it is seen, that from the first organization of the State to the adoption of the Code, a period of more than thirty years, there was a return term and a trial term for all suits in the circuit court; that up to 1839, no judgment could be rendered at the return term, unless the defendant failed to plead to the merits; that from 1839, to the adoption of the Code, no judgment could be rendered at the return term, whether a plea was filed, or an appearance was entered, or not; and that from the adoption of the Code, to the passage of the act before us, judgment might be rendered at the return term, provided the summons was executed twenty days, or more, before the return day thereof; otherwise, not until the second term of the court after the commencement of the suit.

We are not aware that the constitutionality of any of the previous legislation, above referred to, was ever questioned, on the ground that it either delayed or expedited the remedy. This legislative exposition, with the silent acquiescence of the people, including the legal profession and the judiciary, during so long a period of the State's history, is a proper element of a legal judgment on the subject, and is entitled to great weight.—*Moers v. The City of Reading*, 21 Penn. 188. But these, we admit, cannot in any case be carried so far as to override the express terms of the constitution.

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The first and eighth sections of the act, operate to delay the trial of causes, as compared with previous laws on the subject, as follows : In suits against defendants upon whom process has *not* been served twenty days or more, before the return term thereof, trials are delayed six months ; and in suits in which the process *has* been served twenty days or more, before the return term, trials are delayed twelve months. This relates exclusively to the remedy, and does not, in our opinion, impose upon pre-existing contracts new burdens and restrictions which impair their obligation within the meaning of the constitution ; for, in the language of Chief-Justice Taney, in *Bronson v. Kinzie*, “Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional.”

A fair application of the principles established by the supreme court of the United States does not, in our opinion, require a different conclusion as to these sections of the act.

To warrant the court's setting aside a law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist ; and when this delicate duty is performed in a case which requires it, it is more in fulfillment of their own duty than to restrain the excesses of a co-ordinate department of the government.—*Crane v. Meginnis*, 1 Gill & Johnson, 463.

We may remark that other remedial statutes enacted for the benefit of the creditor remain unaltered. Contemporaneous with the institution of his suit, he may, in a proper case, have process of garnishment to secure his debt. He may, before judgment, on making the proper affidavit, take out bail process against the body of his debtor ; and also have his goods and chattels taken under process of attachment.

The cases decided in the highest judicial tribunals of the respective States, sustaining the conclusion to which we have arrived as to the first and eighth sections of the act, are almost too numerous to be cited in a single opinion. In the citations of authority thus far made, we have confined ourselves mainly to cases determined in the supreme court

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of the United States, for the reason that, on constitutional questions like the present, we are to be controlled by its adjudications. We feel it to be our duty, however, to cite the decisions of our own State, bearing upon the question.

Commencing with the first organization of this court, and coming down almost to the present period of time, numerous decisions have been made, sustaining the principle that the legislature may, consistently with the constitution, alter, enlarge, modify, or confer a remedy for existing rights; and that such statutes relate only to the remedy, and may have retroactive, as well as prospective operation.

Wheat v. The State, Minor, 199; *Anonymous*, 2 Stew. 288; *Aldridge v. Tusculumbia R. R. Co.*, 2 Stew. & Porter, 119; *Bloodgood v. Cammack*, 5 Stew. & Porter, 276; *Rathbone v. Bradford*, 1 Ala. 312; *Weaver v. Weaver*, 23 Ala. 789; *Hoffman v. Hoffman*, 26 Ala. 539; *Daily v. Burke*, 28 Ala. 328; *Coosa River S. Boat Co. v. Barclay & Henderson*, 30 Ala. 120; *Curry v. Landers*, 35 Ala. 280.

With the motives and views of policy by which the legislature was actuated in passing the act, we have nothing to do. As a co-ordinate department of the State government, while acting within the sphere of its duty, it was the proper judge of what the policy and the necessities of the State required, being restricted only by constitutional inhibition. All, however, know what was the condition of the State, and the circumstances under which the legislature acted. A war of magnitude, of years' duration, had just closed; its prosecution had called forth and exhausted nearly the entire resources of the State; devastation and ruin had literally been produced. Its people were impoverished, and many of them starving, while some had not yet returned from their prisons of war. Parties to suits, and to contracts, and witnesses, many of them were dead. In many instances, records and papers, important to suitors, had been destroyed by fire, or otherwise lost. Under these circumstances, the legislature might well have given some delay in the preparation of causes for trial; for, in the language of Justice Johnson, in *Ogden v. Saunders*, "it is among the duties of society to enforce the rights of humanity; and both the debtor and society have their inter-

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ests in the administration of justice, and in the general good ; interests which must not be swallowed up and lost sight of, while yielding attention to the claim of the creditor."

A position taken in the argument, and which we have not yet adverted to, we will now briefly notice. It is contended that the first and eighth sections of the act are in conflict with the 14th section of the bill of rights, which declares that "all courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay."

This provision had its origin in "*Magna Charta*," and was intended as a restriction upon royal power. It is an historical truth, that in England, the struggle has constantly been to place limitations upon the power of the crown, and not upon that of the parliament. We admit, however, that in our country, it applies to legislative and all other power.—2 Coke's Institutes, p. 55 ; *Townsend v. Townsend*, Peck's (Tenn.) Reports, 14. But, whilst it is the promulgation of a wholesome restriction, and is of no little value as a safeguard against error and injustice, the landmarks of legislative authority are rather to be found in the division of power contained in the constitution, among the three branches of government, and the specific limitations imposed by the instrument on the law-making branch, than in this general declaration of the bill of rights.—Sedgwick Stat. and Con. Law, 180. But however this may be, we are satisfied that legislation as to remedies and modes of procedure in courts of justice, of the character of that in the first and eighth sections of the act, is not obnoxious to this provision. If it were necessary, we might invoke the aid of legislative exposition upon this question also, by referring to the previous legislation of a similar character already noticed, the commencement of which was coeval with the adoption of the bill of rights itself, which was incorporated in the first, and all subsequent constitutions of the State.

But, whilst we sustain the first and eighth sections of the act, we are constrained to pronounce the second, third, and fourth sections to be unconstitutional as to pre-existing

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contracts. A statute which gives time for something to be done in respect to the determination of a right, is more decisively superior to exception than one which gives time for the sake of procrastination merely.—*Chadwick v. Moore*, 8 Watts and Serg. 52. Under the provisions of section second, as often as an execution may be issued in any case, just so often may it be superseded by a “suggestion of irregularity”; and by proceedings under this section, and sections three and four, which are dependent upon it, the creditor, even after obtaining judgment, may be left almost in a condition, as was aptly said in another case, “in which his rights live but in grace, and his remedies in entreaty only”. But the reasons for our conclusion as to these sections, are more fully given by the Chief-Justice; and we refer to and adopt that portion of his opinion *which relates especially to them*. The same reasoning would apply also to the last clause of section six, which provides for similar suggestions and proceedings, as to judgments and executions in justices’ courts. It must not be understood, however, that this affects the remainder of section six, which relates to justices’ courts, and proceedings before them. No distinct question is presented as to this section, nor as to section seven; but it would seem to follow, from what we have said as to the first and eighth sections, that they are valid provisions.

The only remaining question to be disposed of, is this: It is contended that the legislature, in passing the act, did not conform to the requisitions of that portion of section 2, of article 4, of the constitution of the State, which provides that “each law shall embrace but one subject, which shall be described in the title; and that no law, nor any section of any law, shall be revised or amended by reference only to its title and number, but the law or section revised or amended shall itself be set forth at full length”; and that, therefore, the entire act is void. This objection cannot be sustained to the extent that it is made. The result of the opinion of the court on this question is, that only that portion of section five, which makes possession an indispensable pre-requisite to the execution of a power of sale given by a mortgage, is foreign to the subject men-

tioned in the title of the act ; that the portion thus foreign to the title is void for that reason, if no other ; and that the entire act is not, on that account, invalid. We refer to and adopt the opinion and conclusion of the Chief-Justice on this subject.

There being a general concurrence between my brother BYRD and myself, as will be seen by his concise and perspicuous opinion, the following is the result :

That the first and eighth sections of the act are constitutional ; (which is in conformity with the decision of the court below ;) consequently, the motion for a *mandamus* in the case of *Ex parte* Pollard is refused, and the petitioner must pay the costs of the motion ; and that the second section of the act, (upon which sections three and four are dependent,) is unconstitutional ; (which is in conformity with the decision of the court below ;) consequently, the motion for a *mandamus* in the case of *Ex parte* Woods is refused, and the petitioner must pay the costs of the motion.

BYRD, J.—The case of *Ex parte* Pollard involves the constitutionality of the first section of the act of February 20, 1866.—Pamph. Acts 1865–66, p. 83.

After mature deliberation, my mind has attained the result, that the opinion and conclusions of my brother JUDGE are fully sustained by the adjudications of the supreme courts of the United States, of this State, and of the several States of the Union.

My opinions have long been adverse to the policy and justice of stay-laws.

The act in question is said to be of that class. It is not so styled by the general assembly in the act ; and being a co-ordinate of the other two branches of the State government, it is due that we should attribute to it in its action the best motives and objects which can be reasonably presumed, and make every fair intendment in its favor ; and after doing so, if we have any well-founded doubt as to the constitutionality of its action, we should give it the benefit of such doubt. This, it is conceived, is the duty of each department, in all cases where one has to pass upon the action of the other.

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But for section 6, article vi of the constitution, I suppose no one would doubt the power of the legislature to repeal a law requiring the circuit courts to "be held twice in every year," and by another act to require them to be held once in every year. What is the practical difference in the result of the first section of the act in question and such a law or laws as supposed? In what *legal* sense could such a law be said to impair the obligation of a pre-existing contract?

If the State legislature should abolish all remedies, and provide none, or should provide such as would *barely* leave the remedy worth pursuing, then this court, in my judgment, would be bound, upon principle and authority, to hold such act unconstitutional and void.

The earlier decisions of the supreme court of the United States very clearly drew the distinction between the remedy and the obligation of a contract, and held that a State could not impair the latter, and did not hold that the State could not impair the former. Those decisions left the whole question of remedies to the discretion of State sovereignty. Afterwards, a limitation was engrafted on this doctrine, to the effect that if the remedy was so changed by the State as to make it barely worth pursuing, then such an act would be violative of the Federal constitution.

And now, another limitation is sought to be established by judicial construction and interpretation; and that is, if the remedy is so changed as that, in comparison with the former law, delay is produced in collection of debts, that then the law so postponing the remedy would be obnoxious to the constitutional restriction on the power of the States.

But this limitation has not been, as yet, announced in any adjudication of the supreme court of the United States of which I am aware; and the whole drift of the adjudications of the courts of the several States and of the United States, and especially of this State, as shown in the opinion of my brother JUDGE, being adverse to such a limitation of the power of the States over the subject of remedies, I shall adhere to them, until the Federal court shall engraft such a limitation on its former rulings.

In these times, when the tendency is so apparent toward

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the centralization and consolidation of all sovereign powers in the national government, and the consequent absorption of the sovereign rights and powers of the States—perhaps the natural and inevitable result of late public events—it is the duty of the several departments of the State government, while they concede to the national government all powers delegated to it, and such as are necessary to execute them, and yield a cordial and cheerful support to the Federal Union and authorities, to watch with vigilance, but in a spirit of fairness and loyalty to both, every encroachment of the latter, and in the same spirit carefully and sacredly guard every right and power of the former. For both governments were organized by, and for the good of, the people of the whole country.

In this way we may maintain and perpetuate our liberal and benignant system of State and Federal governments and their blessings. A contrary way will, sooner or later, in my opinion, end in disaster, confusion, and, eventually, despotism.

Their security and permanency greatly depend on the preservation, in vigor and harmony, of the rights, powers, duties, and authority of each in its own appropriate sphere, and, *above all*, with them, the rights and liberties of the people.

I am disinclined, in advance of the supreme court of the United States, to participate in making a decision, the effect of which would be further to contract and circumscribe the rights and powers of the States.

If the question under discussion was *res integra*, my mind would incline to the conclusion announced by the Chief-Justice in his very learned and elaborate opinion.

I am satisfied that the bar of the State, and also the people, like myself, are opposed to the policy of the act in question. It delays the collection of debts due the citizens of the State, and has no effect on the collection of debts due citizens of other States, who can sue in the Federal courts. It materially affects the credit system, which in our present condition is a serious injury. But, all these are matters for the consideration of the law-making, and not the law-con-

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struing department of the State government. Courts expound constitutions and laws—do not make them.

I concur, on all other questions, material to the decision of these cases, in the opinion of the Chief-Justice.

A. J. WALKER, C. J.—The validity of the “Act to regulate judicial proceedings,” approved February 20th, 1866, is controverted, upon the ground of a want of conformity to the latter clause of the second section of the fourth article of our State constitution. The clause is in the following words: “Each law shall embrace but one subject, which shall be described in the title; and no law, nor any section of any law, shall be revised or amended by reference only to its title and number; but the law or section revised or amended shall itself be set forth at full length.” It is contended, firstly, that the law embraces two or more subjects, at least one of which is not described in the title; and secondly, that it revises and amends laws which are not set forth at full length; and that the entire act, if faulty in either of those particulars, is void.

The constitution requires that only one *subject* should be embraced, and that it should be described in the title. *Subject* is a very indefinite word. A phrase may state the *subject* in a very general or indefinite manner, or with minute particularity. The *subject* of laws with such titles as the following, “To adopt a penal code,” “To adopt the common law of England in part,” “To adopt a code of laws,” “To ratify the bye-laws of a corporation,” would be expressed in a very general way, and very little knowledge of the specific provisions of the laws could be gleaned from the title; yet it would nevertheless be true that the subject was described in the title. There are different grades of particularity in which the subject of any writing may be designated. Story and Chitty have both written books, the subject of which may in a latitudinous phraseology be denominated Law, or with less generality the Law of Pleading; and still greater precision would be attained by designating Equity Pleadings as the subject of Story’s work, and Pleadings in Courts of Law as the subject of Chitty’s. It is impossible to prescribe any standard of

particularity for the legislature. The constitution has not attempted to do so. It exacts from the legislature an announcement in the title of the subject, but does not dictate any degree of particularity. This is a matter left to legislative discretion.—*Brewster v. City of Syracuse*, 19 N. Y. 116; *Mutual Insurance Co. v. N. York*, 4 Seld. 241; *Bibb Co. Loan As. v. Richards*, 21 Ga. 592. The object of the constitutional provision was to prevent deception by the inclusion in a bill of matter incongruous with the title. The evil contemplated was not the generality and comprehensiveness of titles. Those faults do not tend to mislead or deceive.

There could be devised for the law in question a title which would describe a subject comprehensive and general enough to embrace all parts of the law. A subject might be found, under which every part of the law might be classed. But that does not meet the constitutional requirement. The particular subject selected by the legislature and put in the title must embrace every part of the law. The question must always be, whether, taking from the title the subject, we can find anything in the bill which can not be referred to that subject. If we do, the law embraces a subject not described in the title. But this conclusion should never be attained, except by argument characterized by liberality of construction and freedom from all nice verbal criticism.

The law in hand is not inconsistent with the constitution because it embraces in the different sections various and distinct plans for the regulation of judicial proceedings. We take the "subject" as it is in the title, and we find everything in the law falling within the comprehensive limits of the one general subject described, except a part of the fifth section, which relates to mortgages and deeds of trust. That section prohibits sales by mortgagees without actual possession of the property. This is not a regulation of judicial proceedings. It produces a necessity for a resort to judicial proceedings, if possession is not voluntarily yielded, but it in no wise contributes to the regulation of those proceedings.

The latter part of this section, which declares that the

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trustee or creditor after default shall have an action at law, and that the rules as to bond, affidavit, &c., in detinue cases, shall apply to suits for personal property, may perhaps, by a very liberal definition of "judicial proceedings," be regarded as coming under the title. It is not, however, necessary to determine this point. A part of the law is certainly alien to the subject described in the title; and thus the question arises, whether the inclusion of the second subject vitiates the whole law, or only affects the incongruous matter. The response to that question is, that if matter foreign to the subject is divisible from that which falls within the title, and the latter can stand and have effect without the former, then only so much of the act as is not embraced by the title is void. This conclusion is sustained by the authorities, and harmonizes with the intention of the constitution to prevent the incorporation into laws of matter incongruous with the title, and effectuates such intention.

The law is not void because it amends or revises other laws. It only repeals laws contravening its provisions. This is nothing more than a repeal of laws in irreconcilable conflict. Its effect is analogous to a repeal by implication. It was never intended by the constitution that every law which would affect some previous statute of variant provisions on the same subject should set out the statute or statutes so affected at full length. If this were so, it would be impossible to legislate. The constitutional provision reaches those cases where the act is strictly amendatory or revisory in its character. Its prohibition is directed against the practice of amending or revising laws by additions, or other alterations, which without the presence of the original are usually unintelligible. If a law is in itself complete and intelligible, and original in form, it does not fall within the meaning and spirit of the constitution.—*Com. v. Drewry*, 15 Grattan, 1. The constitution of Maryland is identical with ours on the subject, and the view above presented is fully sustained in that State.—*Davis v. State*, 7 Md. 151; *Parkinson v. State*, 14 *ib.* 18-21; Sedgwick on Stat. & Con. Law, 27.

Almost all the points above stated, in reference to the

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conformity of the law in its title to the constitution of the State, have been adjudicated in other States, where similar constitutional provisions are found. In California it is held, that those provisions are merely directory to the legislature. The other decisions will be found generally in harmony with the views above expressed. We refer without comment to cases.—*Walker v. Caldwell*, 4 La. 297; *State v. Walker*, 5 ib. 91; *Duverge v. Salter*, ib. 94; *Succession, &c. v. Lanzetti*, 9 ib. 329; *State v. Harrison*, 11 ib. 22; *Bossier v. Steel*, 13 ib. 432; *Rogers v. State*, 6. Ind. 31; *Washington v. Page*, 4 Cal. 388; *Pierpont v. Crouch*, 10 ib. 315; *L. & C. T. R. R. v. Ballard*, 2 Ky. 165; *Phillips v. Covington & C. Br. Co.*, ib. 219; *Robinson v. State*, 15 Texas, 311; *Brewster v. City*, 19 N. Y. 116; *Sun M. J. & Co. v. Mayor, &c.* 4 Seld. 241; *Sharp v. Mayor*, 31 Barb. Sup. Ct. R. 572.

The question of the constitutionality of the 5th section of the law only springs up incidentally in the argument on the point urged before us, that the law embraced a subject outside of the title, and that the entire act was therefore void. We therefore have not been called upon to decide whether the 5th section is void as impairing the obligation of contracts, and we do not wish to be understood as asserting its validity in that point of view, because we have considered another objection to it.

I now proceed to consider the question, whether the first and eighth, and the second, third and fourth sections of the act, impair the obligation of contracts, and are, therefore, violative of the provisions of the State and Federal constitutions upon that subject. After a careful examination of the subject, I feel an undoubting conviction that all of these sections will have the effect of impairing the obligation of pre-existing contracts, and I must so decide.

The obligation of a contract consists in its binding force. It is that which obliges a party to its performance. The law therefore which requires the performance of a contract has been held to be its obligation; and I adopt this definition, without entering into the refinements of argument which have been indulged as to the import of obligation in the constitution.—*Sturges v. Crowninshield*, 4 Wheat. 197; *McCracken v. Hayward*, 2 How. 612. The law obliges

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the performance of an act stipulated at the time specified in the contract. The obligation extends to the time of performance, and a law which dispenses with the payment of money at the appointed time as certainly and clearly infringes the constitution, as if it declared the debt void. There is, indeed, ground for the supposition that the prohibition of the constitution was specially aimed at legislation which delayed the payment of debts, because such legislation was the subject of great complaint about the time of the adoption of the constitution.—4 Wheat. 197–205–207.

The prohibition of the constitution is to the *impairment* of the obligation. This must not be confounded with destruction. Health may be impaired, and yet not destroyed. So may the obligation of a contract. The obligation is impaired when it is made worse—diminished in quantity, value, excellence, or strength. “The objection to a law that it impairs the obligation of a contract can never depend upon the extent of the change which the law effects in it.” Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute, or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.—*Green v. Biddle*, 8 Wheat. 84. One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all; this is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, or dispensing with any part of its force. *Planters' Bank v. Sharp*, 6 Howard, 327.

The legislature has no independent and original authority to postpone for a single day the payment of a debt. The obligation to pay at the stipulated time is absolutely excepted from legislative authority.—*Commercial Bank v. Mississippi*, 4 Sm. & Mar. 507; 2 Story on Const., § 1385; *Ogden v. Saunders*, 12 Wheaton, 327; *Golden v. Prince*, 3 Wash. Cir. Ct. R. 319.

As the legislature cannot directly impair the obligation, *a fortiori* it cannot by indirect means. In the language of Chief-Justice Marshall, “the principle in the contempla-

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tion of the framers of the constitution was the inviolability of contracts, and this principle was to be protected in whatever form it might be asserted."—*Sturges v. Crowninshield*, 4 Wheat. 200.

I admit that it is in the province of the legislature to provide remedies for the enforcement of contracts, and that it may make modifications and changes of those remedies, adjusting them according to its view to the attainment of fair judicial investigation, correct administration of justice, and the just and equitable execution of judgments. I admit, also, that delay is unavoidably incident to every remedial agency which can be provided, and that the legislature is not restricted from making changes in remedies merely because some increased delay may result. This retardation in compelling the performance of contracts is tolerated, not because there is any direct legislative authority over the subject, but because there is a right to regulate the remedy, and some delay is unavoidably incident to the exercise of that right. There must be some limitation on this authority over the remedy; otherwise the prohibition of the constitution, from mere facility of evasion, is utterly ineffective. It is a doctrine of universal acceptance, frequently announced by the supreme court of the United States, that legislation professedly upon the remedy may assume such a character as to impair the obligation of the contract. Between regulations of the remedy, which, though they may in some cases affect contracts, are permissible, and those which impair the obligation, there is a shadowy and undefined line of demarkation. Unable to define this line, the judicial mind must decide in each case, whether the law falls on the one side or the other of it. In doing this, however, the guidance of principle must be sought. The principle which, in my judgment, should govern in such inquiry, is this: when a change or modification of remedy is clearly disclosed by the machinery provided, and by the necessary operation and effect, to be no real adaptation of the remedy to the ends of justice, and not to be adapted to contribute to those ends, and to be a mere device for delaying the performance of contracts, it is unconstitutional, because it impairs the obligation of contracts. This prin-

ciple is an inevitable deduction from the indisputable proposition heretofore stated, that there is no legislative authority over the obligation of contracts, and the toleration of its touching that obligation injuriously to the slightest extent is based entirely upon the fact that such effect is necessarily incident to the government of the remedy. The legislature can not elevate that which is tolerated only as an incident into a principal motive of action. It can not make delay the object of legislation; and when it shapes its changes in remedies for the accomplishment of that object, it transcends its authority. Whenever it can be clearly ascertained from the law that it has done so, it is, in my judgment, a judicial duty to declare the law unconstitutional, no matter, under what plausible guise the purpose may have been covered, or by what high considerations of patriotism or benevolence the legislature may have been influenced. If a *perceptible* departure of the slightest extent from the appointed sphere of changing the remedy for its amelioration as a remedy, and a *perceptible* interference to delay the performance of contracts, in violation of their stipulations, *for the sake of delay*, and not resulting incidentally, are sanctioned, then there is no practical restraint upon the legislature. The constitutional prohibition must always fall before the ingenuity of legislative contrivance. There is no principle which would tolerate the passage of the line of demarkation one step, and there arrest the legislature. If the performance of the contract can be delayed for the sake of delay one day, there is no principle which negatives the power to delay for twenty years.

While the legislature can not make laws for the mere purpose of delaying the performance of contracts, it may accelerate the remedy, because, in proportion as the coercion of immediate performance of stipulations is approximated, the sanctity of contracts is sustained and cherished, and the purpose of the constitution preserved.

For authority on this subject, we should look to the decisions of the supreme court of the United States; for, as to the present question, that court is to us an appellate tribunal, and it is our duty to adopt its doctrines and make our decisions quadrate with them. An examination of some

of those decisions will, I think, show that the views I have just expressed scarcely go to the extent which the principles announced in them would justify. Chief-Justice Marshall, in *Sturges v. Crowninshield*, (4 Wheat. 122,) remarked, that without impairing the obligation of a contract, the remedy might certainly be modified as the wisdom of the nation might direct. The opinion in that case is not characterized by the author's accustomed clearness and definiteness of expression, and the explanation, perhaps, is, that the judgment in the case was the result of a compromise among the members of a divided court.—Opinion of Justice Johnson, in *Ogden v. Saunders*, 12 Wheat. 272. Chancellor Kent twice, in his commentaries, disapproves and regrets, as tending to mislead, the “general and latitudinary manner” of the remark I have quoted; (1 Kent’s Com. m. p. 419, n. a, m. p. 456, d;) and another eminent writer joins in the criticism—Sedgwick on S. & C. Law, 643, 644. The remark of Chief-Justice Marshall was not designed to claim for the legislature an unlimited control over the subject of remedies, without regard to the obligation of the contract. More guarded announcements upon the subject were afterwards made by the supreme court of the United States. In *Green v. Biddle*, (8 Wheat. 17,) Judge Story held, that laws which so change the remedy as to materially impair the rights and interests of the party, violate the constitution. In *Ogden v. Saunders*, (12 Wheat.) Mr. Justice Johnson, while repudiating the doctrine that the remedy must be regarded as grafted in the contract, proceeds to say, (p. 284,) “Yet I freely admit that the remedy enters into the views of the parties when contracting; that the constitution pledges the States to every creditor for the full, and fair and candid exercise of State power to the ends of justice, according to its ordinary administration, uninfluenced by views to lighten, or lessen, or defer the obligation to which each contract fairly and legally subjects the individual who enters into it.” And Mr. Justice Trimble, in the same case, said, (p. 327,) “Whether the law professes to apply to the contract itself, to fix a rule of evidence, a rule of interpretation, or to regulate the remedy, it is equally

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within the true meaning of the constitution, if it in effect impairs the obligation of the contracts."

Tracing in the order of their occurrence the most prominent decisions of the supreme court of the United States, we come next to *Bronson v. Kinzie*, (1 Howard, 311.) It was there held, that a law which authorized a redemption within twelve months, of property sold under a decree of foreclosure, and also a law prohibiting sales in such cases for less than two-thirds of the appraised value, violated the constitution. The court admitted, and illustrated by examples, the power of a State over the remedy, with the qualification, that the obligation of the contract should not be impaired, and that if such an effect should be produced, it was immaterial whether it should be done by acting on the remedy, or on the contract itself. The court further says, the remedy "is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the constitution mainly intended to secure. * * * And it would but ill become this court, under any circumstances, to * * * sanction a distinction between the right and the remedy, which would render the provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result." This opinion is elevated in its dignity and authority as a guiding judicial precedent, because, although it was at the time assailed by Mr. Justice McLean, in a dissenting argument of great power, it has ever since been recognized and asserted as a correct exposition of the law, without the slightest manifestation of opposition to it. *McCracken v. Hayward*, 2 How. 698; *Grantley's Lessee v. Ewing*, 3 How. 707; *Curran v. State*, 15 *ib.*; *Howard v. Bugbee*, 24 *ib.* 261; *Hawthorne v. Califf*, 2 Wallace, 10. By looking into these later cases, we find the construction which the court has put upon *Bronson v. Kinzie*.

McCracken v. Hayward involved the constitutionality of a law of Illinois, prohibiting execution sales for less than two-thirds the appraised value of the property. The court, Justice Baldwin being its organ, said: "The obligation of the contract between the parties in this case was to perform the promises and undertakings contained therein; the right

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of the plaintiff was to damage for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant until the judgment was satisfied pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in the stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale, on reasonable notice, it would have conferred a right on the plaintiff which the constitution made inviolable; and it can make no difference whether such right is conferred by the terms or the law of the contract. Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, * * * to be ascertained by appraisement or any other mode of valuation than a public sale, affects the obligation of a contract as much in the one case as the other; for it can be enforced only by a sale of defendant's property, and the prevention of such sale is the denial of a right." This decision is professedly a reassertion of the doctrine of *Bronson v. Kinzie*. So, also, the court unanimously asserted the same doctrine in the later case of *Grantley's Lessee v. Ewing*, (*supra*,) in the following words: "This court held in *Bronson v. Kinzie*, that the right, and a remedy substantially in accordance with the right, were equally parts of the contract." The tendency of the supreme court of the United States, as indicated in the view above presented, has been, in the progress of its decisions, to narrow the limits of State authority in reference to contracts. In the two cases last noticed, the position was at least very closely approximated, that the remedy is a part of the contract; but I do not think, and, therefore, do not claim, that the court designed to go to that extent. It is, however, very fully maintained in the cases which I have brought to view, that State laws shaping the remedy so as to impair the obligations of contracts are void; that the constitution pledges the State to every creditor for the

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full, fair and candid exercise of State power to the ends of justice, uninfluenced by views to lighten, or lessen, or defer the obligation ; that the clause of the constitution in question was mainly designed to secure a remedy which protects the right, and that a remedy in accordance with the right is part of the contract. It would be the grossest absurdity to say, when a legislature has passed a law changing the remedy so as to postpone the performance of contracts, and delay the payment of debts, without regard to improving and bettering the remedy, that it has satisfied the pledge imposed by the constitution to legislate fairly and candidly for the ends of justice, without any view to defer the obligation ; or that the object of the constitution, to secure a remedy which protects the right of payment according to the contract, has been attained ; or that a remedy in accordance with the right, as to the time of performance, has been provided. On the contrary, in such a case it is clear, that such legislation opposes and thwarts those rights which the constitution designed to secure.

I come now to apply the principles and authorities above stated to the question as to the constitutionality of the 1st, 8th, 2d, 3d, and 4th sections of the law. The contracts in both the cases before us were made before the passage of the act. The validity of the law is therefore to be tested in its operations on antecedent contracts, and all the principles which I have announced apply only to the law as it affects antecedent contracts. The question as to the validity of the law in reference to subsequent contracts, which could be presumed to have been made in reference to it, would be entirely different.

Do the first and eighth sections of the law impair the obligation of contracts? Before the adoption of this act, a creditor, by obtaining the service of his summons twenty days before the court, had a right to demand a judgment at the first term, and could have obtained it, unless his case was continued for some reason sufficient in the estimation of the presiding judge. The first section of the law forbids the rendition of judgment until the third term after the service of the summons. It denominates the first a return term, and the second an appearance and pleading

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term, and declares that no trial shall be had until the next term after the appearance and pleading term. In the circuit court, a delay of twelve months at least is effected, for the terms by the constitution are semi-annual. In the several city courts, the terms, at the third of which a trial may be had, are by section eight required to be six months apart; so that the period of twelve months at least in these courts must expire before a judgment can be asked. The creditor is not permitted to ask a judgment at the first or the second term. I can find no other conceivable purpose of this regulation, except to prevent the enforcement of a contract. This is not only its obvious purpose, but its effect. The law by its mandate requires this delay, although there may be no defense, no appearance, and even though there may be a confession of the cause of action. What adjustment of the remedy to the attainment of justice, what safeguard for a fair trial, what convenience, or opportunity for a fair trial, what convenience, or opportunity for the procurement of testimony, what economy of expense, is consulted, in delaying to the third term, by an unvarying rule in all cases, irrespective of their exigencies, and especially in cases where there is no defense or a confession of the cause of action? Where there is no defense, no appearance, no evidence, and no trial, the object of justice is attained by the simple entry of judgment. That is the remedy, and that is all of it as far as the court is concerned. When the court is forbidden to enter judgment until the third term in such cases, the effect is not to regulate any remedy for the administration of justice. It is simply to stop the machinery by which justice can be obtained. The plaintiff remains with folded hands for at least twelve months, without his remedy by judgment, and that too when the delay is not incident to preparation for a trial. Where there is a real ground of litigation, the argument may be less striking, but it is equally correct. The postponement is not predicated of any difficulty of pleading, or of procuring evidence, or any peculiarity in the condition of the defendant, such as absence, sickness, or service in the army, which might produce delay in the preparation for trial. There is an unvarying, indiscriminating rule of

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delay, without reference to the demands of justice. Proceedings in admiralty, actions of detinue, and of forcible entry and detainer, and forcible detainer, are excepted from the operation of the law. These actions belong to the class usually litigated, and would certainly have been embraced, if affording a proper opportunity for the preparation of pleading and evidence had been in contemplation. Why is it that in the city courts, which are held oftener than twice a year, that the term next after the return term is not the pleading term? Why skip that term, and make the third term the pleading term? The answer is obvious—an intervention of less than six months between the terms would not accomplish the purpose of delay, and hence it is required that periods of six months shall intervene between the courts within the plan of the law. Every one is bound to see and admit that the first and eighth sections establish a mere plan for the delay and postponement of the performance of contracts, and do not adjust the machinery of courts to the attainment of a fair trial, or to the security of justice. Under the principles which I have laid down, and I think sustained, such provisions violate the constitution.

In an opinion delivered in 1858, in *Bugbee v. Howard*, (32 Ala.,) I intimated the belief that the legislature, from considerations pertaining to the police and economy, and the general welfare of the State, might modify its remedies so as to afford relief, where from unexpected and sudden revolutions, and disasters in trade and commerce, or from war, or any other cause, a general and extended sacrifice of property by forced and unqualified sales under process, giving rise to pauperism, destitution, and the deprivation of the means of a comfortable subsistence, would otherwise result. I regret that I now feel no assurance of the correctness of this intimation. My opinion has been overruled by the supreme court of the United States, which reversed the decision of this court. I can perceive no ground upon which the convictions of the legislature as to the welfare of the people can enlarge the authority to interfere, through the manipulation of the remedy, with the obligation of contracts.

The constitution throws over the authority to provide for

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the general welfare the qualification that the obligation of contracts must not be impaired. We have seen that laws which make sales under execution subject to redemption within twelve months, and prescribe that sales shall not be made for less than one-half or two-thirds the appraised value, can not be constitutionally applied to pre-existing contracts. These laws certainly contribute less to prevent the enforcement of a contract according to its stipulations, than a law which closes the door of the tribunal of justice, at two successive terms, to one who has instituted a suit, and invokes the power of the law to enforce the obligation of his contract; and they as clearly have their origin in a conviction of the legislature as to what was demanded by the public good and the necessity of debtors. Guided by the decisions in reference to those laws, I can not conclude that the provisions contained in the first and eighth sections are constitutional. But upon this point my brethren differ from me, and my opinion is not the opinion of the court. I attain my conclusion with reluctance, and after a concession that my decision should be different if I doubted upon the subject. It is always a duty to sustain the constitutionality of laws, when the question is regarded as doubtful; and that is peculiarly the case when the point to be determined is whether the legislature has passed the undefined boundary between a legitimate regulation of a remedy, and one which impairs the obligation of a contract. To borrow an illustration, this boundary is like that which divides night from day: it can not be determined precisely when it is passed, and yet there are times when it is safely affirmed to be night or day. When a law is in the twilight of uncertainty, intervening between clearly valid and clearly void legislation, the judicial mind must doubt, and should sustain the law. If I thought such to be the character of the provisions now under examination, I should sustain them.

The legislation of this State affords precedents for the delay of judgment to the second term, but there is no precedent for such postponement as is provided by this law. The toleration by the legal sentiment of the State of a law postponing to the third term can not be argued from its toleration of a law postponing to the second term, for

every increase of delay develops and manifests more clearly the interference with contracts. Where an advance has been made to doubtful ground on the brink of a precipice, the safety of another step in the same direction can not be argued from the safety of the steps already taken.

My brethren concur with me in the opinion that the 2d, 3d, and 4th sections of the law, affecting the collection of judgments, are unconstitutional, in so far as they concern judgments on pre-existing contracts.

The 2d section withholds all interference with a plaintiff having a judgment, until he sues out an execution and places it in the sheriff's hands, and until the sheriff has made a levy. But, when a levy has been made, it allows the process of collection to be stopped, and it prescribes the mode of proceeding by which it is to be stopped. Professedly, the proceeding is to be stopped for the purpose of affording a remedy to the defendant against some irregularity or illegality in the execution, or in the proceeding under it. It is a significant characteristic of this remedy, that it is confined to defendants upon whose property a levy has been made, and is not available to any person against whom there is an execution full of illegality or irregularity, without a levy. This has rather the appearance of a feature of law to prevent the collection of money, than of one to provide a needed remedy. It operates only where it is necessary to prevent the making of money. But how is the process of execution to be stopped? The defendant, upon whose property a levy has been made, may suggest in writing to the sheriff that there is some irregularity or illegality in the execution, or in its issue, or in the proceedings under it. No affidavit, not even an affirmation, is required. It is not necessary to show in what the irregularity or illegality consists. No evidence of the truth of the suggestion, or of its correctness in point of law, is necessary. It is sufficient that the suggestion is made; no matter though it be a mere pretense, unfounded in fact, and unfounded in law. The defendant may then pay the costs, except sheriff's commissions, and, if personal property is levied on, give bond, in double its value, conditioned to deliver the property to the officer, or pay its

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value, if the suggestion should be decided adversely to him. When the levy is upon real estate, no bond is required. These things being done, the execution is superseded, and must be returned. The execution may be superseded upon suggestion, when there is really not the slightest ground of objection to it. The suggestion of mere irregularities of the sheriff in his proceedings under the execution, which can not vitiate the process itself, is made a legal reason for *supersedeas*. The plaintiff is deprived of his execution, without any security or indemnity. The bond is only in double the value of the property, no matter how small that may be, and, besides, may be discharged by the delivery of the property, if the suggestion is decided against the defendant. Thus, even though the defendant has made a false suggestion, he is rewarded by the possession of the property until the trial, and the plaintiff is certainly in no better condition than when the execution was returned. Although there may be several defendants, and a suggestion of illegality or irregularity only as to one, and not affecting the others, the execution must be returned stayed as to all by suggestion. The stoppage of the execution, as to the defendants not making the suggestion, is an interference to prevent the performance of a contract, not even disguised by the semblance of the regulation of remedy. Upon the return of the execution to the next term of the court, with the endorsement "stayed," the 3d section interposes, and says to the plaintiff, you shall not have a trial at this term without the defendant's consent, but the case shall be continued for six months. This continuance is a mandate of the law, even though the suggestion may be contradicted by the record, or be altogether insufficient in law. At the next term of the court, the 4th section, in contravention of the party's right to the payment of the entire debt, interposes, and prohibits a judgment, if the defendant will pay the costs and one-third of the debt and interest. But the operation of these provisions in preventing the collection of judgments does not stop here. After the plaintiff has gotten rid of the suggestions at the end of this long process, and sues out a new execution, he may be again stopped by a new sugges-

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tion, and the same dilatory proceedings may be had; for whenever a levy is made, the execution may be stayed by suggestion; and thus the proceedings to make the money due by judgment, however industriously prosecuted, may proceed in a circle never to end in success. Such provisions as the 2d, 3d, and 4th sections of the law, so obviously pervert the remedy to the impairment of the obligation of contracts, and so obviously fall under the influence of the principles established by the supreme court of the United States, that it cannot be necessary to argue the subject. Those provisions render the remedy for the collection of judgments by execution hardly worth pursuing, and their validity can not be maintained for one moment under the decisions in *Bronson v. Kinzie*, and *McCracken v. Hayward*. They impair the obligations of contracts, and are void.

I do not deny that the legislature, in passing this law, was actuated by the purest and noblest motives. I concede that the condition of our oppressed and impoverished people appeals strongly to the sympathies of every good man. I do not deny that the policy of the law may be wise and good, though, upon this subject, it is not my province or purpose to express any opinion. Nevertheless, the legislature has, in my judgment, undertaken to do what the constitution does not permit; and, thinking as I do, I can preserve my sense of judicial integrity only by deciding as I have done. I make the decision with pain and regret, but I have no election.

NOTE BY THE REPORTER.—At a subsequent day of the term, on petition for rehearing by the counsel of Pollard, the following opinion was delivered:

A. J. WALKER, C. J.—The petition for a re-hearing invites the court to a re-examination of the validity of the act “to regulate judicial proceedings,” approved February 20th, 1866. The petition is made upon the apprehension that the different members of the court may not have considered the effect of the 14th section of the 1st article of the State constitution, with the care which it merits. That

section is in the following words : "All courts shall be open ; and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and right and justice administered without sale, denial, or delay." This constitutional provision is designed to guaranty the administration of right and justice without delay, in actions *ex delicto*, as well as *ex contractu*, and in favor of defendants as well as plaintiffs. This guaranty is more extensive in the class of cases affected by it, than that which prohibits the making of laws impairing the obligation of contracts. But, so far as actions *ex contractu* are concerned, the question of the constitutionality of the law is the same, whether the test of the provision as to the delay of right and justice, or that as to impairing the obligation of contracts, is applied. Under either test, there is a right in the legislature to regulate the remedy, and all legislation which is truly a regulation of the remedy is valid. The question which is so elaborately discussed, in the opinions already delivered, controls the point to the more special consideration of which we are invited by the petition for a re-hearing. This view was entertained by us when our opinions were prepared ; and therefore but little attention was given to the point in those opinions. The granting of a re-hearing, upon the question suggested, would simply bring up a re-examination of the principles announced in our respective opinions already delivered. Each one of us is content to abide by the doctrine already announced by him. We think, therefore, the granting of a re-hearing could be of no profit. The questions of the case are of the highest importance, both on account of their intrinsic character, and on account of the variety and extent of interests, and the number of persons affected by them. We have, therefore, been solicitous to draw information and receive argument from every proffered or attainable source, and would gladly avail ourselves of the further discussion which counsel would make ; but the questions would be the same which we have already considered, and we have given them the most elaborate and careful consideration and the most prolonged discussion among ourselves ; and the state of our respective convictions would not, in our belief, be changed

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by a new argument. We therefore respectfully decline to grant the petition for a re-hearing, and this response has the concurrence of each member of the court.

EX PARTE FLOYD.

[APPLICATION FOR SUPERSEDEAS OF WRIT OF RESTITUTION.]

1. *Supersedeas of writ of restitution in unlawful detainer.*—In an action of unlawful detainer, judgment being rendered in the circuit court in favor of the plaintiff, and a writ of restitution awarded, there is no statute which either requires or authorizes the clerk, when an appeal is taken from that judgment, to supersede the writ of restitution; nor does an appeal bond, the penalty of which is double the amount of the costs, operate as a *supersedeas* of such writ.
2. *Jurisdiction of supreme court.*—The supreme court has no jurisdiction, in the first instance, to issue an order to the clerk of the circuit court, requiring him to supersede a writ of restitution, in a case in which an appeal has been taken from the judgment of the circuit court: if the clerk refuses to perform his duty, application must first be made to the circuit court.

THE petition in this case alleged, that in November, 1865, the petitioner rented or leased a tract of land, situated near the city of Montgomery, from Mrs. Laura Holt, for the term of one year from the 1st December, 1865, entered into possession under said contract, and planted a crop; that in February, 1866, Mrs. Holt instituted an action of unlawful detainer against him, and recovered a judgment before the justice of the peace for the possession of the land; that the cause was removed by the defendant, by *certiorari*, into the circuit court of Montgomery, where a judgment was rendered in favor of the plaintiff, at the spring term, 1866, and a writ of restitution of possession was awarded; that the defendant reserved several exceptions to the rulings of the circuit court on the trial, and, desiring to take an appeal, asked the court to allow him to give bond, with sureties, in double the amount of the yearly rent of the premises, and

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to retain the possession of the land until the expiration of his lease; that the court would not allow him to do this; that he afterwards applied to the clerk for an appeal from said judgment, returnable to the present term of this court, and gave bond in double the amount of costs, and offered to give bond in double the amount of the yearly rent, as assessed by the jury, for the purpose of superseding the writ of restitution; and that the clerk refused to accept such additional bond, and refused to supersede the writ of restitution. The petitioner therefore prayed this court "to cause a *supersedeas* to be issued in said cause," restraining the sheriff and the plaintiff from any proceedings under the writ of restitution, pending the appeal in this court; and alleged irreparable injury unless he was allowed to retain the possession of the land.

J. FALKNER, for the petitioner.

A. J. WALKER, C. J.—We are asked "*to cause*" the *supersedeas* of a writ of restitution, issued from the circuit court, in an action of unlawful detainer, from which an appeal has been taken to this court. An appeal bond, in double the amount of costs, was given, and the clerk refused to issue a *supersedeas* of the writ of restitution. It is contended that an order should be issued from this court, to the clerk of the circuit court, requiring him to issue a *supersedeas* of the writ of restitution.

There is no statute which requires a clerk of the circuit court to supersede a writ of restitution issued in an action of unlawful detainer, where an appeal has been taken to this court; nor is there any statute authorizing a *supersedeas* of such writ, as the effect of an appeal bond. Under the Code, (§ 3019,) a bond in double the amount of the judgment, conditioned to prosecute the appeal to effect, and to satisfy such judgment as the supreme court may render, operates as a *supersedeas* of the judgment. But this is incapable of application to judgments in actions for unlawful detainer. The judgment, in such actions, is not merely for money, but the chief purpose and end is the recovery of the possession of lands. As a judgment for the possession of

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lands is not equivalent to, or convertible with, a judgment for money, a bond in double the amount of the judgment can not be given. This section has relation only to judgments for money. This is made clear by considering it in connection with sections 3020, 3023, 3024, and 3025. These sections, in making special provisions for *supersedeas*, where a decree is rendered for the performance of an act other than the payment of money, or where there has been a judgment against the claimant in a trial of the right of property, or a judgment for the recovery of slaves, demonstrate that the general law on the subject of appeal bonds operating to supersede judgments, applies only to judgments for money.

We know of no principle of common law, by which the clerk is clothed with authority to supersede judgments, from which appeals have been taken, or by which bonds given to him can have the effect of superseding them.

The clerk did not violate or omit any duty, by the refusal either to supersede the judgment in this case, or to accept a bond as an instrument operating to supersede the same. We therefore can not issue any order to him, requiring him to do either of these things.

[2.] Furthermore, even if it had been the duty of the clerk of the circuit court to issue a *supersedeas*, this court could not issue an original and direct order to him, requiring him to discharge that duty. Such an order would be an original writ of *mandamus*. The jurisdiction of this court is appellate, and not original; and it does not issue original writs, except as the necessary means of giving it a general superintendence and control of inferior jurisdictions.—*Ex parte Simonton*, 9 Porter, 383; *Mansony*, *Ex parte*, 1 Ala. 98; *Ex parte Croom & May*, 19 Ala. 561. The cases of *The State, ex rel. v. Porter*, (1 Porter, 688,) and *Ex parte Pickett*, (24 Ala. 91,) may indicate a class of cases excepted by necessity from the general rule; but, if so, this case does not fall within the exception. The ordering a *supersedeas* of a writ for the delivery of possession is by no means necessary to the exercise of a superintendence and control by this court over the circuit court. It is altogether a different matter from the issue of a *certiorari* to the clerk,

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for the purpose of procuring a complete transcript. Without a complete and correct transcript, it is impossible to revise the action of the subordinate tribunal; and therefore a *certiorari* is a necessary means of exercising a superintendence and control over the circuit court. On the contrary, the correction of the errors of the subordinate tribunal is not at all dependent upon the execution or *superseas* of the writ of restitution.

This point seems to be well settled. In *Ex parte Mansony*, (1 Ala. 98,) it was decided, that this court could not award a *mandamus*, to compel a circuit-court clerk to issue an execution, because it involved the exercise of original jurisdiction. It was held to be requisite that an application should first be made to the circuit court, and that the action of the circuit court could then be made the subject of revision in the supreme court. In *Smith v. Carr*, (Hardin's R. 305,) it was decided, that appellate jurisdiction, *ex vi termini*, implied a resort from an inferior tribunal of justice to a superior, for the purpose of revising the judgments of the former, and did not consist in correcting the acts of the ministerial officers of the inferior tribunal. Upon this principle, it was held, that an original application to the appellate court, for the correction of irregularities in an execution, would not be entertained. This was a Kentucky decision; and the striking similarity between the constitutional provision in that State and in this, as to the jurisdiction of the court of appeals, enhances the value of the decision as an authority here. In the *Bank of Newbern v. Stanley*, an application was made to the supreme court of North Carolina, for a *mandamus* to the clerk of a subordinate court, requiring him to issue an execution. The court maintained, that it was incompetent for an appellate court to control the acts of the officers of the subordinate court, except in the exercise of, and as ancillary to, its revising power.—2 Dev. 476.

The correction of the errors of the ministerial officers of subordinate courts is the exercise of original jurisdiction, and appertains to courts of original jurisdiction, and not to this tribunal. The accidental circumstance of this court's being in session, and of the circuit court's not being in

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session, and of the consequent superior convenience and celerity of a remedy in this court, can not justify the assumption of unconstitutional jurisdiction. The supreme court of the United States, acting under a constitutional warrant very like that of this court, as far as this question is concerned, made a decision in *Marbury v. Madison*, (1 Cranch, 137,) announcing a doctrine utterly irreconcilable with the idea, that the jurisdiction invoked in this case could be exercised by a court of appellate authority. The relief sought being such as pertains to original, as contra-distinguished from appellate jurisdiction, this court not only can not require the clerk of the circuit court to correct any error into which he may have fallen, but it can not itself, by its direct action, correct such error.

If any hardship results from the failure of the statutes of the State to provide for the *supersedeas* of judgments affecting the possession of land, the remedy is with the legislature.

Motion refused.

NOTE.—A. J. WALKER, C. J.—The opinion in this case was hastily written; and it may be that there are expressions in it, which need qualification. Those expressions are such as may intimate that an appeal can not have the effect of a *supersedeas*, unless it is expressly so declared by statute. The statute (Code, § 3019,) expressly denies to an appeal from the circuit to the supreme court the effect of a *supersedeas*, except as provided by the Code. This statute should have controlled this case, without any reference to the common-law effect of appeals.—February 3, 1868.

EX PARTE HILL ET AL.

[APPLICATION FOR PROHIBITION.]

1. *Constitutionality of act approved December 14, 1865, to provide for location of court-house in Dallas county.*—The act approved December 14, 1865, entitled “An act to provide for the location of the court-house in Dallas county,” (Session Acts, 1865–6, p. 464,) is not unconstitutional, because it was passed without prior consultation with the people of the county, nor because it limits the selection of the county site, at the preliminary election, to a choice between Selma and Cahaba.

APPLICATION for the writ of prohibition, or other remedial process, to be directed to the probate judge and members of the commissioners’ court of Dallas county, restraining them from removing the county records from Cahaba to Selma. The application was made by citizens of said county, and was first addressed to the Hon. P. G. Wood, judge of the city court of Selma, by whom it was refused. The removal of the county records was being made under the authority of the act of the legislature, approved December 14, 1865, entitled “An act to provide for the location of the court-house in Dallas county,” (Session Acts, 1865–6, p. 464,) and an election held under that act, on the first Monday in May, 1866, at which a majority of the votes cast were in favor of Selma as the county site; and the application was based on the alleged unconstitutionality of that act.

GEO. W. GAYLE, for the petitioners.

JONA. HARALSON, *contra*.

A. J. WALKER, C. J.—A petition was addressed to the judge of the city court of Selma; asking that he would interpose to prevent the removal of the seat of justice of Dallas county, and its records, from Cahaba to Selma. This petition was refused by the judge to whom it was addressed;

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and now a petition is addressed to this court, for the relief declined by the judge of the city court of Selma.

We waive the question of the jurisdiction of this court, in the attitude in which the subject is presented, without intending to admit it, and overrule the application on its merits. The petition is based upon the ground of the alleged unconstitutionality of the law authorizing the permanent location of the court-house of the county; and the unconstitutionality of the law is assailed for the two reasons, that it was passed without any consultation with the people of the county, and in the absence of an opportunity on the part of the people to petition the legislature; and that, in the preliminary election for the seat of justice, only two places, Cahaba and Selma, were by the law permitted to be in nomination.

The validity of a statute can never depend upon the antecedent consultation of the people by the legislature, nor upon the affording to them an opportunity to express their sentiments through petitions. The removal of the court-house of a county, and its permanent location, is indisputably a permissible exercise of legislative authority. This authority it may exercise without consulting the people of the county, through the ballot, or otherwise; and if it chooses to select two places, and leave the choice between them to popular vote, it is the manifestation of a deference to public opinion, which is not demanded by the constitution.

If the question of the power of the legislature, to make the removal of the court-house to Selma dependent upon the condition of its approval by a popular vote, were *res integra*, there would be room for much argument; but that question is settled, and is not now open for debate.—*Stein v. Mayor &c. of Mobile*, 24 Ala. 591-619.

There are many laws for the establishment of the seats of justice of the different counties, in which the act, instead of fixing the location, has prescribed a mode for its accomplishment by commissioners, or by popular vote, or by the selection of two or more places, and a popular election between them; and such laws have never been deemed unconstitutional. The acquiescence in the validity of such

laws, by the people, the bar, and the bench of the State, running back to the organization of the State government, would be entitled to great consideration, and settle the question if it were doubtful.

Petition overruled.

Mr. Justice BYRD not sitting in the case.

HINSON vs. LOTT.

[BILL IN EQUITY TO ENJOIN COLLECTION OF STATE AND COUNTY TAX ON IMPORTED LIQUORS.]

1. *Constitutionality of State law taxing imported liquors.*—The State has no right to impose a tax for revenue on liquors imported from foreign countries, so long as they remain in the hands of the importer, and in the original casks or barrels in which they were imported; but the restriction on the State's right to tax ceases, when such liquors pass out of the hands of the importer, or when the original casks are broken by him; and it does not extend to liquors brought here from other States of the Union. (BYRD, J., *dissenting* as to the last proposition.)
2. *County tax on imported liquors.*—Since the 73d section of the revenue law, approved February 22, 1866, authorizes the assessment of a tax for county purposes on the amount "shown by the assessment books," and the tax on imported liquors is not entered on "the assessment books", the commissioners' court has no authority to levy a county tax on such imported liquors.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 2d May, 1866, by John W. Hinson, against E. B. Lott, who was the tax-collector of Mobile; and sought to enjoin and restrain the collection of the State and county tax on the plaintiff's imported liquors, which he had imported from foreign countries, and from other States of the Union, and claimed the right to sell, both in the original casks in which they

were imported, and in smaller quantities. The defendant was seeking to collect the State tax on these liquors, under the provisions of the 13th, 14th, and 15th sections of the act approved February 22, 1866, entitled "An act to establish revenue laws of the State of Alabama;" and also a county tax, which the commissioners' court of said county had assessed under the 73d section of said act. These sections of said act, the construction and validity of which are involved in the case, are in the following words :

"SEC. 13. *Be it further enacted*, That before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquors into the State, for sale, shall first pay the tax-collector of the county into which such liquors are introduced a tax of fifty cents per gallon upon each and every gallon thereof; *provided*, however, that any such liquors distilled in, or re-sold in the State, having paid one such tax, shall not be liable to any tax on the re-sale; *provided*, also, that alcohol employed for medicinal or manufacturing purposes, shall be exempted from the operations of this section.

"SEC. 14. *Be it further enacted*, That it shall be the duty of every vender, owner, or consignee with power of sale, of spirituous liquors, bringing any such liquors into the State for sale, to make full returns, under oath, of each and every gallon of such liquors received for sale, to the tax-collector of the county into which the same may be brought, and to pay the taxes thereon prescribed in the 13th section of this act, before offering the same for sale ; and for every case of failure to make such returns and payment as aforesaid, such vender, owner or consignee shall pay an additional tax of fifty per cent.; and in case of a fraudulent return, shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one thousand dollars, or imprisonment for not more than three years, at the discretion of the jury trying the case.

"SEC. 15. *Be it further enacted*, That it shall be the duty of the tax-collector of any county into which spirituous liquors may be brought or offered for sale, and returns have not been made to him therefor, as provided in the 14th sec-

tion of this act, to ascertain whether all such liquors have paid the taxes prescribed by the 12th section of this act; and for this purpose he shall examine the vender under oath, who shall show to the satisfaction of the collector that such tax has been paid on all liquors in his possession, or sold by him, and failing to do so, such vender shall be liable for the tax on the same and an additional penalty of fifty per cent."

"SEC. 73. *Be it further enacted*, That the commissioners' court at such term shall determine and order the rate of per centage to be collected for county purposes, upon the payment of State tax, as shown by the next assessment book; *provided*, however, that the county tax shall not exceed fifty per centage of the State tax, as aforesaid."—Session Acts, 1865–6, pp. 15, 16, 27.

It was agreed between the counsel of the respective parties, in the court below, that "no objection should be taken to the presentation of the question by bill in chancery, and no question raised as to the regularity of the proceedings of the tax-collector; but that the defendant should be considered as interposing a demurrer, and assigning such special causes of demurrer as might raise the question of the constitutionality of the said act of the legislature, under which the defendant was proceeding to collect said tax." The cause being submitted on the bill and this agreement, the chancellor dismissed the bill; and his decree is now assigned as error.

D. C. ANDERSON, for appellant.—1. The tax on liquors introduced into the State, is an impost, or duty on imports. When imported for sale, it has the character of an *import* as long as it remains in the hands of the importer, and in an unbroken package.—*Brown v. Maryland*, 12 Wheaton, 437, 441.

2. The words of the constitution do not limit the inhibition to imports from foreign countries.—12 Wheaton, 449; *Almy v. State of California*, 24 How. 169.

3. The act operates directly on commerce among the States, and comes within the reason of the prohibition. It embarrasses the interchange of commodities between the

States.—*State v. North & Scott*, 27 Miss. 477; *New York & Erie Railway v. New Jersey*, 4 Am. Law Register, 385.

4. On imports the State can lay no other tax than to execute her inspection laws.

5. The words of the act exclude the idea that it affects the *interior* traffic of the State; 1st, because it is not permitted to be sold in the State at all, until the charge is paid; 2d, on its way to the market, or to sale, it is intercepted; 3d, it assumes a restraining power on the introduction of the commodity for sale; 4th, it may prohibit the introduction; 5th, it is taxed only in the hands of the importer.

6. The act is not a police, but a fiscal measure. It recognizes the traffic as lawful. It regulates the terms of its introduction, as an article of commerce. The normal condition of inter-state commerce, under the constitution, is *freedom* from State restriction. In this question, the parties interested are citizens of different States.—See *The Passenger Cases*, 7 How. 400. The Alabama pilotage laws are declared to be unconstitutional.—5 Howard, 595.

7. It operates directly on a manufacturer living in Ohio. A burden is laid on his right to import.

SMITH & HERNDON, *contra*.—1. So far as the question of violation of the 10th section of the 1st article of the constitution of the United States is concerned, (and this law relates to liquors introduced into the State from other States of the Union,) they cannot be considered as “imports”, within the meaning of that article. “Imports” refer to articles brought into the Union from *foreign* countries; and the States being integral and constituent parts of the Union, it would be a perversion of language to say that the *transit* of articles from one part of the Union to another was an *importation*.—5 How. 594, 601; 9 Cranch, 104; Bouvier, tit. “*Importation*.”

2. So far as the liquors brought into the State from a foreign country are concerned, it is admitted, if complainants are the importers, that the tax would be void, so long as the liquors remain in the original bale, package, or vessel in which they were imported. But, if they are pur-

chasers from the importers; or if, being importers, they break the package for use or retail, by drawing off the liquor in small quantities, then they cease to be an import, or a part of foreign commerce, and become subject to the laws of the State, and may be taxed for State purposes, and the sale regulated by the State, like any other property. Chief-Justice Taney's opinion in *The License Cases*, 5 How. U. S. Rep. 574, construing Chief-Justice Marshall's decision in *Brown v. State of Maryland*, 12 Wheat. 446.

3. As to the liquors brought into the State from another State: The power to regulate commerce between the States is not prohibited by the constitution to the States; and until congress acts upon the subject, the States have the power to adopt regulations respecting it.—*Commissioners of Pilotage v. Cuba*, 28 Ala. R. 185; *Cooley v. Philadelphia*, 12 How. U. S. 318, 324; 5 How. U. S. Rep. 578, 601, 625. And as congress has made no regulation on the subject, the traffic in the article may be regulated by the State, as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or its duty to pursue.—5 How. 586. And the legislation of congress expressly recognizes this to be the true rule on the subject.—U. S. Internal Revenue Laws, § 78.

The case of the stamp-tax on bills of lading, on gold exported from California, of course, falls within the influence of 12 Wheaton; for the tax extends to gold exported to foreign countries.

JOHN W. A. SANFORD, Attorney-General, for the State. The power to tax persons, property, and occupations, is an incident of sovereignty, and may be exercised by the State upon all persons and property within its jurisdiction.—*The People v. Coleman*, 4 Cal. Rep. 57; *Nathan v. Louisiana*, 8 How. 82. And the fact that the exercise of this power may in some manner affect commerce, does not render it unconstitutional; for, while the State can not regulate commerce, it may do many things which, more or less, have an influence upon it. The State may tax a ship, or other vessel used in commerce, the same as other property owned by

its citizens.—*Passenger Cases*, 7 How. 402. It may tax any vocation connected with commerce, however necessary it may be to its successful prosecution.—*Nathan v. Louisiana*, 8 How. 82.

But the revenue laws of Alabama do not regulate commerce with foreign nations, or with the States of the Union. They prescribe no terms upon which vessels may enter its ports; they place no imposts upon articles of merchandise brought into the State, *simply as imports*. All goods, wares, merchandise and property, of every description, enter its territory without any tax or custom. But, after certain articles are in the State, and are offered as commodities of sale and traffic, then, some of them before, and some after sale, are liable to taxation. But this is a matter of internal police; and if this can not be permitted, the resources of the State would be greatly diminished. Furthermore, this is but a regulation of internal trade, which is in no manner affected by the power to regulate commerce.—*Passenger Cases*, 7 How. 415. "The completely internal commerce of a State may then be considered as reserved for the State itself."—*City of N. Y. v. Miln*, 11 Pet. 147. So true is this opinion, that, notwithstanding it has been held, in *The State of Maryland v. Brown*, (12 Wheaton, 219,) that importation implies the right to sell, "so long as the articles are in the original bales or packages," the supreme court of Alabama, in the case of *Dorman v. The State*, has declared an act prohibiting the sale of intoxicating liquor (which may have been imported) in a particular portion of the State valid, and in no manner violative of the Federal constitution.—34 Ala. 216, where this whole subject is elaborately examined.

If the State can prohibit the sale of imported articles in one part of its territory, it can in a much larger scope, and thus seriously affect the interest of the importer. To this extent, the restraint would be an impediment or burden to commerce. If one burden or impediment is lawful, why not another? If the profits of the merchant can be diminished by limiting his market to certain districts, why can not his profits be decreased by the imposition of taxes? If the first can be done without violating the article of the

constitution, reserving the power to regulate commerce, why can not it be done in the second instance? The sale of imports may be sustained, by the power to regulate internal affairs; can not taxes be imposed by the same authority? If taxes can not be imposed upon the articles of commerce brought from other States, (as all property may be the subjects of trade,) it would follow, that nothing could be taxed in the State which was not produced within its limits. Such a conclusion would be disastrous to the State, and in contradiction to the right (often declared by the supreme court of the United States) of a State to tax all property within its territory, which belongs to its citizens.—*Nathan v. La.*, 8 How. 83.

All liquor brought into the State is not taxed, but only that portion which is offered for sale by “dealers, venders, or consignees with power of sale.” May not this tax be upon a particular vocation, and the returns of the gallons of liquor required to be made, merely the means of ascertaining the amount of taxes such persons as “dealers” &c., should pay? Upon what principle can it be said, that the section of the law imposing taxes upon liquors regulates commerce, any more than the section which imposes a tax upon the largest quantity of goods on hand at any time within the year? Other merchandise, as well as liquor, is brought from neighboring States and foreign countries. If the section of the revenue laws taxing liquors be declared void, so must every portion of the law taxing property not produced within the State. All tax laws may, directly or indirectly, affect commerce; but certainly they would not be considered as regulating commerce. Such a decision would render it impossible to support the State government.

The revenue laws of Alabama are not more objectionable than the license laws of Massachusetts, Rhode Island, and New Hampshire; yet the laws of those States were declared constitutional.—*License Cases*, 5 How. 504. Nor do the *Passenger Cases*, (7 How. 283,) conflict with the decision in 5 Howard.

The *Passenger Cases* arose upon an attempt to derive revenue by a tax on commerce between the United States and foreign nations, according to the laws of New York

and Massachusetts. The decision in those cases can have but little effect in determining the one before the court. In one of them, the attempt was clearly made to raise a revenue on commerce by one State, altogether on alien passengers; and by the other, on all passengers indiscriminately. In this case, the intention is to raise revenue by a tax on property purchased in another State, and brought within the limits of this, owned here, enjoyed here, protected here, and receiving the benefits of government in equal degrees with all other property. Why should it not bear equally the burden of government? In the case of *The State of Maryland v. Brown*, (12 Wheat.) it was decided merely that, while the imported goods were in their original bales or packages in the hands of the importer, they could not be taxed. But, if the importer divides the merchandise, and puts it in smaller or different packages, for sale, or sells it in its original form, and it thus enters into the property of the State, I am not aware of any principle of law which will exempt it from taxation.

A statute of New Hampshire enacted, "that if any person shall, without license from the selectmen," &c., "sell any wine, rum, gin, brandy, or other spirits, in any quantity," &c., "such person, so offending, shall be fined, for each and every offense, on conviction thereof, in a sum not exceeding fifty dollars."—5 How. 555. Notwithstanding the decision of *Maryland v. Brown*, (12 Wheat.,) the above law was declared constitutional. By that act, an importer, after he had paid the tariff, could not sell liquors without a license to do so. The license was a tax, and required to be obtained before the sale of liquor. The revenue law of Alabama enacts, (§ 13,) "that before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer introducing such liquors," &c., "shall first pay the tax-collector," &c. By this law the tax is required before offering for sale liquors, &c. If the license law of New Hampshire has been declared constitutional, why not the revenue laws of Alabama? The laws of both States were made to regulate their internal trade, and therefore are not obnoxious to the objection of attempting to regulate commerce.

A. J. WALKER, C. J.—The 13th section of the revenue law, adopted at the late session of the legislature, requires the payment of a tax of fifty cents per gallon upon liquor introduced into this State by dealers in the same. It is settled in the *License Cases*, (5 Howard, 594,) that a State has no right to tax goods imported from a foreign country, while they remain in the hands of the importer, in the form and shape in which they were brought into the country; but that when the original package, barrel, or cask, is broken up, for use or retail, by the importer, or has been disposed of by him, it may become a subject of State taxation. The tax prescribed in the act of the legislature, therefore, can not be imposed upon liquors in the hands of the importer from foreign countries, remaining in the barrels or casks of importation; and the court should have enjoined the levy of the tax upon such liquors, so remaining. The importer has a right to sell, free from State interference, in the original casks or barrels, and to that extent, and no further, should be protected.

As to liquors introduced from other States, the question is materially different. We do not understand that the supreme court of the United States has held the power of congress to regulate commerce with foreign nations, among the several States, and with the Indian tribes, to be exclusive. Certainly, opinions to that effect are to be found in its reports; and such was the opinion of Judge Story. Chief-Justice Taney, with great emphasis, both in the *License*, and in the *Passenger Cases*, reported in 5th and 7th Howard, expresses the opposite opinion. In the *License Cases*, the point was expressly adjudicated by the holding of the court, that a law of New Hampshire was constitutional, notwithstanding a man had been indicted and convicted under it for a misdemeanor, because he had brought a barrel of American gin from Boston and sold it in New Hampshire. The court, Chief-Justice Taney being its organ, said: "The mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States."

It is conceded that it is difficult to decide, from the many

and various opinions of the judges of the supreme court of the United States in the many cases upon the subject, what its position upon this point is.—*Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheaton, 419; *License Cases*, *supra*; *Passenger Cases*, 7 Howard, 283; *Cooley v. Board of Wardens*, 12 Howard, 299; *City of New York v. Miln*, 11 Peters, 102. But the question of what is the position of the supreme court of the United States on this point has been a matter of careful inquiry in this court. In *The Commissioners of Pilotage v. Steamboats Cuba et al.*, (28 Ala. 185,) it was held; that the grant of the power to congress in reference to commerce did not involve a prohibition to the States to legislate upon the same subject. The judgment in that case was reversed by the supreme court of the United States, in 1859, on another point, and with a very clearly implied recognition and approval of the position of this court on this question.—*Smoot v. Davenport*, 22 How. 227. The supreme judicial tribunal of the United States very clearly recognizes the doctrine, that State regulations on the subject of commerce are not void because they infringe the constitution, but are void only when “they interfere with, or are contrary to, the laws of congress, made in pursuance of its constitutional power to regulate commerce.” The invalidity of State legislation upon the subject is put expressly upon the ground, that an act of congress, passed in pursuance of the constitution, must, under the second section of the 6th article of that instrument, be the supreme law of the land; and that therefore a law of the State, “though enacted in the exercise of powers not controverted, must yield to it.” We thus have a recognition, as late as 1859, of the doctrine, that there is no constitutional prohibition to the States to legislate on the subject of commerce, and that that power is only denied to a State when there is an act of congress with which it interferes; and this, too, in a case from this court.

In 1859, the case of *Dorman v. The State*, (34 Ala. 216,) was decided, Mr. Justice R. W. WALKER delivering the opinion. In that case, in one of the most carefully considered and able opinions ever delivered from this bench, and after one of the ablest arguments ever heard in this court, the

question of the concurrence of the State authority to regulate commerce was passed upon. The court said: "The power to regulate commerce with foreign nations is not so exclusive in congress, as to prevent all State legislation upon the subject. It belongs to the class of concurrent powers; and every such power may be exercised by the State, subject to the single limitation, that, in the event of actual collision, the law of congress prevails, and the State law ceases to operate. It does not appear that, in the application of this act to the defendant, any collision has taken place with the laws of congress. He has, therefore, no right to call upon us to arrest its execution." There may be some matters connected with the subject of commerce, of such a nature that the power of congress to legislate in reference to them must necessarily be exclusive.—*Cooley v. Board of Wardens, supra*. But we have no such subject in this case.

Without further remarks upon the subject, we express the opinion, that the power of the State to legislate on the subject of commerce is, as a general rule, concurrent with that of congress, and must only yield when it comes in conflict with an act of congress; and it is settled in this court that such is the law, and such is the ascertainment of the law by the supreme court of the United States.

There being no prohibition upon the State, to legislate upon the subject of the commerce of other States with it, it may so legislate, with the qualification, that it can not enter upon ground occupied by congress. There is no act of congress with which a State tax upon liquor introduced from other States can interfere; and therefore it is permissible for the State to impose a tax upon the sale of liquor introduced from another State. Such a tax is not only constitutional, but obviously just and proper; for a tax to the same extent is imposed upon liquors manufactured in the State.

It is admitted that the law under consideration is broad enough to apply to liquors imported from foreign countries; but it is void only in so far as it is in collision with the acts of congress on that subject.

It is contended that the tax is unconstitutional, because

it is a tax upon imports. The word *import*, in the constitution of the United States, refers only to articles introduced from foreign countries.—Opinion of Mr. Justice McLean, *License Cases*, *supra*; opinion of Mr. Justice Catron, *ib.* 601; Bouvier's Law Dic., *Importation*; *Barrett v. S. & D. R. R. Co.*, 2 Man. & Gr. 155, note.

We have been referred to the case of *Almy v. State of California*, 24 How. 169. This case was in reference to a law of California, requiring a stamp to be put upon a bill of lading, for transportation from any point within, to any point without the State. The supreme court of the United States, in the case cited, held, that this law was unconstitutional, in its requisition that a bill of lading for gold, to be transported to New York, should be stamped. The unconstitutionality of the law was put upon the ground, that it was a tax upon an export. It is now contended before us, on the authority of this case, that an article carried from one State to another is exported from one, and imported into the other; and that, therefore, the words *import* and *export* are used in reference to the transfer of an article from one State into another. The argument built upon this decision would be good, if it appeared that the gold was destined for no place besides New York. The statement of the facts of the case is very meagre, and found only in the opinion of the court. From that statement it can not be ascertained that the gold was not shipped to New York, *in transitu* for some foreign port. From some expressions in the argument of the court, we infer that such was the case. We are not convinced that it was intended to hold that the character of an "import" or "export" could be stamped upon an article, by its transfer from one State to another; and we are not disposed to regard it as an authority to that effect.

We are referred to some State decisions, which are supposed to militate against the views expressed by us. If they do, we are not willing to follow them.

The chancellor should have dismissed the bill, as to the tax upon liquor introduced from other States, and as to liquor imported from a foreign country, and not kept unbroken in the vessel in which it was imported, in the

hands of the importer; and should have retained it as to imported liquor in the hands of the importer, and in the unbroken bulk in which it was imported, and also as to the tax for county purposes.

2. By the 73d section of the revenue law, county assessments, not exceeding fifty per cent. upon the State tax, are authorized to be made upon the assessment books, on the first Monday of September, by the court of county commissioners. The tax on liquor offered for sale does not go on the assessment books; and there is consequently no power in the court of county commissioners to assess a county tax upon the State tax on liquor introduced into the State.

The decree is reversed, and the cause remanded.

BYRD, J.—There is only one point of difference between a majority of the court and myself. There seems to be a conflict between different decisions of the supreme court of the United States, on the question upon which we differ. This apparent or real conflict, in my opinion, has been occasioned by not keeping up the proper distinction between the powers of the State and congress over the subject of internal commerce.

The States certainly have the right to regulate *internal* commerce, and congress has *the exclusive* right to regulate foreign and inter-state commerce.—2 Story on Const., § § 1067, 1071; *Gibbons v. Ogden*, 9 Wheaton, 1–198; *Brown v. Maryland*, 12 Wheat. 419, 446; 3 Cowen, 713; *City of N. Y. v. Miln*, 11 Peters, 158; *Passenger Cases*, 7 Howard, 393–411; 1 Kent's Com. § 10; Rawle on Const., ch. 9, p. 81; Sergt. on Const., ch. 28, p. 291. These authorities hold, that the power granted to the national government, to regulate foreign and inter-state commerce, does not stop at the boundaries of a State, but follows such commerce within the limits of a State, so long as the article of commerce retains the *form and character* in which it enters a State; and that whenever a State passes a law to regulate its *internal* commerce, such law is constitutional; but, as soon as congress exercises its power, within its constitutional limits, to regulate foreign and inter-state

commerce within a State, that in such case, the State law must give way before the supremacy of the national law. And here is where the apparent conflict between certain adjudications commences. Some of them have not drawn with clearness the distinction between the power of a State to regulate commerce by law *within its own limits*, and a law of a State which affects commerce *between the States*, after it enters a State, and before it is sold by the importer.

In the language of Chief-Justice Marshall, in the case of *Brown v. The State of Maryland*: "It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State."—12 Wheaton, p. 449. And in the language of Chancellor Kent, "This power, like all other powers of congress, was plenary and absolute within its acknowledged limits."—1 Com. 437. And Judge Story says: "It has been settled, upon the most solemn deliberation, that the power" (speaking of the power of congress to regulate commerce between the States) "is exclusive in the government of the United States."—2 Story on Const., § 1067. And again, he says (§ 1071): "The reasoning by which the power given to congress to regulate commerce is maintained to be exclusive, has not been of late seriously controverted."

I have not noticed, in any opinion of any court, or elementary writer, that the 10th article of the amendments to the constitution, has been considered in connection with this question. That article is as follows: "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This, to my mind, is very suggestive. If powers not delegated to the United States are reserved, upon a familiar rule of construction, it would seem to follow, *that powers delegated are not reserved*. But, however this may be, I am of opinion, upon authority and principle, that a State can make no discrimination between foreign and inter-state commerce; and to hold that a State has not the power to tax foreign goods in unbroken packages, before they enter into the mass of the property of the State, and that it can so tax unbroken packages coming from a sister State, before they

enter into the mass of the property of the State, is such a discrimination. Such a discrimination would be one in favor of foreign commerce, against the commerce of a sister State.

Besides, if a State has the power to make any law affecting inter-state commerce, to the extent above defined, it would seem to follow, that it had the power to discriminate between the commerce of different States; *the very evil*, in my judgment, which the framers of the constitution had in view to prevent, in conferring the power on congress to regulate commerce between the States. The power to regulate foreign and inter-state commerce is conferred on congress in the same clause of the constitution, and in language which admits of no distinction as to its influence on the question under discussion.

Upon this construction of the constitution, the concurrent powers of the State and Federal governments are limited within appropriate boundaries; and, what is very desirable, it defines such powers within limits which will greatly diminish the antagonism of the legislation and adjudications of the legislative and judicial departments of the State and national governments; both of which, *within their appointed spheres, are sovereign and supreme.*

I am content in relying upon the authority of such distinguished jurists as Chief-Justice Marshall, Judge Story, and Chancellor Kent.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application for a rehearing by the appellant's counsel, the following opinion was delivered:

A. J. WALKER, C. J.—We deem it necessary to respond to a part of the argument made in support of the application for a re-hearing in this case. Our original opinion does not admit that the case of *Almy v. The State of California*, (24 Howard, 169,) necessarily involved the assertion, that the carrying of articles from one State to another made them exports, or that the bringing them into one State from another made them imports, within the meaning of the second paragraph of the tenth section of the first article of

the constitution. We then thought that the meager statement of facts in the opinion did not exclude the idea, that the gold mentioned in the opinion was shipped from San Francisco to New York, *in transitu* to some foreign port. The counsel of the appellant accompany their application for a re-hearing with a transcript of the record, and an examination of it convinces us that the gold was shipped to New York as the termination of the voyage, and that the question, whether the carrying of an article from one State to another constituted it an "export," was involved in the case. Notwithstanding the question was involved in the case, it was passed over without notice in the opinion; and it would seem as if the point had not been called to the attention of the court. The phraseology of the opinion indicates that the diversity between the facts in that case, and in those of *Brown v. The State of Maryland*, was not observed, and that the case was regarded in the same light as if the shipment had been made to a foreign port; and this explanation is rendered more plausible by the fact, that the counsel on neither side of the case appear to have noticed this diversity of facts in their arguments. It must be conceded, however, that the failure to notice the difference in the facts might have resulted from a conviction that it was immaterial. We can not, however, avoid feeling some doubt, whether the court intended to stamp every transfer of property from one State to another with the character of an exportation, and every introduction of property into one State from another with the character of an importation.

We entertain a thorough conviction, that the clause of the constitution referred to above does not prohibit the taxing by a State of the sale of articles brought into it from another State. This conviction is based upon the belief, that the terms "imports" and "exports," in that clause, refer alone to things introduced from foreign countries, and sent out to foreign countries. The question was directly presented in the case of *Pierce et al. v. The State of New Hampshire*, (one of the *License Cases*,) 5 Howard. The law of New Hampshire made the sale of liquor without license an indictable offense. Under that law, the defendants were indicted, and convicted, for the

sale without license of a barrel of American gin, purchased in Massachusetts, and brought coastwise to New Hampshire, and there sold in the same barrel, and in the same condition, in which it was purchased. The court instructed the jury, "that the statute, as it [regarded] that case, was not repugnant to the clause in the constitution of the United States, providing that no State shall, without the consent of congress, lay any duty on imports or exports ; because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in the United States." Chief-Justice Taney, in the concluding paragraph of his opinion, clearly determines the point. He says : "Upon the whole, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and congress have clearly the power to regulate such importations, under the grant to regulate commerce among the several States ; yet, as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State, as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue." Thus, we have the declaration of Chief-Justice Taney, who wrote the opinion in *Almy v. State of California*, that the State of New Hampshire had the power to tax a barrel of gin brought into that State from Massachusetts and sold in the form of its introduction. In the same case, Judge McLean, (p. 594,) and Judge Catron, (p. 611,) and Judge Daniel, (p. 614,) and Judge Woodbury, (p. 623,) very clearly indicate the opinion, that imports and exports, as mentioned in the 10th section of the first article of the constitution, refer alone to the introduction and sending off of articles in foreign commerce.

In the case of *The State v. Pinckney*, (10 S. C. Law R. Richardson, 474,) it was held, that articles brought in from other States, and sold in the form and bulk in which they were so brought, were not imports within the meaning of the provision of the constitution of the United States, and that a statute taxing them was valid. A decision identical in principle with that of *The State v. Pinckney* was made in

Georgia, in *Cumming v. Savannah*, R. M. Charl. 26. To the same effect was the decision in Mississippi, (Judge Sharkey delivering the opinion,) in *Harrison v. Mayor of Vicksburg*, 3 Sm. & M. 581. In the State of Michigan, (*Beall v. State*, 4 Blackf. 107,) there is a decision which supports the same principle.

The remark made by Chief-Justice Marshall, in *Brown v. Maryland*, (12 Wheaton,) applying the principles of that case to importations from another State, was a mere *obiter dictum*, and was not treated as authority in the *License Cases*. Judge McLean (p. 594) says of it: "Whilst the remark can not fail to be considered with the greatest respect, coming as it did from a most learned and eminent Chief-Justice, yet it can not be received as authority. It must have been made with less consideration, than the other points ruled in that important case."

Section nine of the first article of the constitution relates to the migration or *importation* of persons. The word "importation" here, obviously, and by universal consent, relates to the introduction of persons from abroad; and no reason can be perceived why the word importation in that section should receive an interpretation variant from that which is sought to be put upon the word "import" in the next section. It seems a fair deduction, that "import" in the constitution was used in reference to the geographical area within which it prevails, and was designed to characterize articles brought into that area from without. Consistently with this idea, we find that the power to regulate commerce was not left to a general phraseology, but, by express words, is extended to commerce with foreign nations, and among the States, and with the Indian tribes.

The power of taxing chattels brought in from the sister States of the Union, in the form in which they were brought in, has often been exercised in this State; and it is not known that it has ever been denied. It has certainly been exercised in reference to slaves and dry-goods brought into the State.

When we seriously doubt whether a law is unconstitutional, after we have applied the legitimate tests, we must rule in favor of its validity. We, of course, recognize our

obligation to follow the decisions of the supreme court of the United States. But, conceding that the case of *Almy v. California* is in point, an examination of it fails to show that the question was considered; and we deem it inconsistent with the opinions of the judges in the *License Cases*, and with the decisions of the State courts. It is also at war with the undisputed practice of this State, and with our own convictions. In the *Passenger Cases*, Chief-Justice Taney expressed his consent that thenceforward it should be regarded as the law of the court, that the opinion upon the construction of the constitution should always be open to discussion, and its judicial authority should depend on the force of the reasoning in support of it. If the supreme court of the United States did intend, in *Almy v. California*, to give to the word "import" in the constitution a meaning broad enough to affect the trade between the States, it will not be disrespectful for us to rest upon our own reasoning, the decisions in other States, and the opinions in the *License Cases*, and afford an opportunity by deciding in favor of the State law for a revision of the question. At least, we can not say that we are clear in the opinion, that the law is unconstitutional, or that the supreme court of the United States will so decide; and we must sustain it.

We remark, in conclusion, that congress has not regulated either the quantities or bulks in which articles from other States may be introduced, as it has done in reference to articles brought from abroad. If it be held that articles coming from other States can not be taxed in the original form, our laws regulating the traffic in liquors will be susceptible of evasion so easily as to make them of little practical value.

The petition for a rehearing is overruled.

DOUGLAS ET AL. vs. BEASLEY.

[ACTION ON PROMISSORY NOTE, BY ASSIGNEE AGAINST MAKER.]

1. *Sufficiency of complaint.*—In an action on a promissory note, by an assignee against the maker, the complaint must aver the assignment, or contain some other averment showing the plaintiff's ownership of the note; and the want of such an averment is a substantial defect, (Code, § 2405,) for which a judgment by default will be reversed on error. (BYRD, J., *dissenting*.)

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. F. BUGBEE.

THIS action was brought by Joseph Beasley, against Charles Douglas and Elisha A. Hearne, and was commenced on the 15th December, 1863. The complaint was in the following words: "The plaintiff claims of the defendants twenty-seven hundred and fifty dollars, due by promissory note, made by them and one Mallett Douglas, on the 5th September, 1857, payable to Y. W. Graves, at the office of Rugeley, Blair & Co., New Orleans, La., on the 1st day of January, 1860, bearing interest from the date thereof; together with the interest thereon." Judgment by default was rendered against both of the defendants, at the fall term, 1865; and that judgment is now assigned as error.

GEO. W. STONE, and CHILTON & THORINGTON, for appellant.
CLEMENTS & WILLIAMSON, *contra*.

JUDGE, J.—In *Browder v. Gaston & Wellborn*, (30 Ala. 677,) this court held, that in an action on a promissory note, by the transferree against the maker, the complaint must aver the assignment, or contain some other allegation to show the plaintiff's ownership; that if this is omitted, the complaint is substantially defective; and that the defect is available on error, after judgment by default, notwithstanding section 2405 of the Code provides that "no judgment

can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action."

The correctness of this decision has been assailed in the argument of this cause, and we are asked to disregard it as authority. There are other decisions of this court, bearing upon the question; and without entering into a particular examination of them, I deem it only necessary to state, that I do not conceive any one of them to be materially in conflict with *Browder v. Gaston & Wellborn*. See *Blount v. McNeill*, 29 Ala. 473; *Stewart v. Goode & Ulrick*, 29 Ala. 476; *Mahoney v. O'Leary*, 34 Ala. 97.

If the main question decided in *Browder v. Gaston & Wellborn* was *res integra*, I might come to a different conclusion from the one attained therein by the court. But nine years have elapsed since that decision was made, and it was pronounced by an undivided court. It simply declares a rule of practice, not affecting the material rights of any party; it may be easily conformed to, and, in my opinion, should not now be disturbed. In the language of Chancellor Kent: "If a decision has been made upon solemn argument, and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or correct exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public, if precedents were not duly regarded, and implicitly followed. * * The language of Sir William Jones is exceedingly forcible on this point. 'No man,' says he, 'who is not a lawyer, would ever know how to act; and no man who is a lawyer, would, in many instances, know what to advise, unless courts were bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate.'"—1 Kent's Com. 476.

I would not be understood as favoring the doctrine of *stare decisis*, to the extent indicated by Sir William Jones, in the quotation made from him by Chancellor Kent. The quotation, however, serves to illustrate the great value placed upon the doctrine by distinguished jurists.

On the authority of the case of *Browder v. Gaston &*

Douglas et al. v. Beasley.

Wellborn, supra, the judgment of the circuit court is reversed, and the cause remanded.

A. J. WALKER, C. J.—The suit is here by another person than the payee of the note which is the subject of the suit, and there is no averment of title in the plaintiff. This complaint does not, according to the decision in the case of *Browder v. Gaston & Wellborn*, (30 Ala. 677,) contain a substantial cause of action; and the judgment of the court below must be reversed, if that decision is not overruled. In my judgment, this case ought to have been reversed, upon the doctrine of *stare decisis*, without discussion. The correctness of the decision in *Browder v. Gaston & Wellborn, supra*, is assailed, and it is argued that it should be overruled. I think it contains a sound and correct exposition of the law, and it is meet that I should state the reasons for my approval of it.

The complaint in that case averred, that the note in suit was made payable to a certain person; and that person was not the complainant. It was not averred that the title to the note, or the right of action upon it, had ever passed out of the payee; and nothing was shown from which such fact could be inferred. The court decided, (as I think it could not avoid deciding,) that the complaint did not show a substantial cause of action in the plaintiff, but, on the contrary, showed a cause of action remaining in the payee. It is contended that the assertion in the complaint that the plaintiff *claimed* the sum due on the note and interest, involves, or is equivalent to, an averment of property in the plaintiff; and that therefore the complaint really contained an allegation that the plaintiff was the owner of the note. The obvious import of the word "claims," in the connection in which it occurs, is that the plaintiff seeks to recover, or demands; and such, I think, is the general acceptation of the word. Besides, it is expressly decided in *Crimm v. Crawford*, (29 Ala. 623,) that the phrase "the plaintiff claims," in a complaint for the recovery of chattels in specie, does not imply an assertion of title, but that all averment of title in that action was dispensed with.—See, also, *George v. English*, 30 Ala. 582. The word *claims*, in

the prescribed forms, has therefore a construction established by a decision of this court, and that decision would be overruled by holding that it includes an averment of title.

Section 2228 teaches that complaints should conform substantially to the schedule of prescribed forms. An examination of those forms shows that, in every case where a note is sued upon by any other person than the payee, as well as where an account is sued upon by a transferee, the title or property of the plaintiff is carefully stated. The decision in *Browder v. Gaston & Wellborn*, in holding an averment of property in the plaintiff necessary, is in strict conformity to the forms prescribed by the Code.

There is not the slightest conflict between the decision in *Browder v. Gaston & Wellborn*, and the decisions in *Stewart v. Goode & Ulrick*, (29 Ala. 476,) *Blount v. McNeill*, (*ib.* 473,) and *Mahoney v. O'Leary*, (34 Ala. 97.) The decisions are all made in reference to complaints which were in themselves unobjectionable. A defect in the cause of action could only be discovered by looking to the date of the commencement of suit. The complaints themselves contained a substantial cause of action. Section 2405 of the Code certainly designs to cure errors, when the complaint in itself contains a substantial cause of action; and as the complaints in those cases did contain substantial causes of action, error which could have been discovered by looking to the summons was cured after judgment by default. The complaint in *Browder v. Gaston & Wellborn* did not contain a cause of action, and the error could not be cured by section 2405 of the Code. There is no conflict. All the cases are harmonious, and all of them should, in my opinion, stand.

If farther reasons in support of my position are desired, I refer to the brief of the Hon. Geo. W. Stone, of counsel for the appellant, which contains an extended, and, in my judgment, unanswerable argument, in favor of the correctness of the decision in the case of *Browder v. Gaston & Wellborn*.

BYRD, J.—The only question raised on the record is, whether the court below erred in rendering judgment final

Douglas et al. v. Beasley.

by default on the complaint. Every reasonable intentment should be made in favor of the judgment.—*Letondal v. Huguenin*, 26 Ala. 552. But if, after invoking the aid of this long established and conservative rule, it is clear that the judgment is erroneous, it should be so pronounced. The solution of the question involves the interpretation and construction of the following sections of the Code: 2161, 2165, 2227, 2228, 2234, 2129, 2402, and 2405; and also the correctness and consistency of the following adjudications of this court: *Blount v. McNeill*, 29 Ala. 473; *Stewart v. Goode & Ulrick*, *ib.* 476; *Browder v. Gaston & Wellborn*, 30 Ala. 678; *Mahoney v. O'Leary*, 34 Ala. 98; and *Crimm's Adm'r v. Crawford*, 29 Ala. 623.

By section 2234 of the Code, the complaint must in all cases accompany the summons; and by section 2161, the summons must be issued by the clerk, and be accompanied by the complaint, signed by the plaintiff, or his attorney, setting forth "the cause of action." The effect of these two sections of the Code is, to make the summons and complaint so far one instrument, that they must be construed together; and this view is further sustained by section 2165, which requires the summons to be executed by the officer, leaving "a copy of the summons and complaint" with the defendant, and which fact he must return with the process. The issuance of the summons is, therefore, the date of the filing of the complaint, and must be so taken, where nothing appears in the record to negative this presumption. Prior to the Code, the declaration was filed at the return term of the *capias ad respondendum*. The Code restored the common-law practice to the extent above indicated. In this case, the record shows that the provisions of sections 2161, 2165, and 2234, were complied with.

Sections 2227 and 2228 furnish rules for pleadings, in cases where no form is provided in the appendix to part 3d of the Code, and make any pleading which *substantially* conforms to such forms, sufficient. What is meant by the word "substantially," will hereafter appear. Now, if the 4th form in the Code, which is as follows—

"A. B., plaintiff, }
 vs. }
 C. D., defendant. }
 —, and payable the — day of —, with interest.

"E. F., attorney for plaintiff."

—sets forth a substantial cause of action in favor of the plaintiff, and against the defendant, it seems to me very clear that the complaint in this case, as shown in the record, "substantially conforms" to that, *which* is the *only one* given in the Code against the *maker* of a promissory note. If the word "*claims*," used in the forms, means anything, it is certainly that the right of action is in the plaintiff; and so it must signify in the 4th, 5th, 9th, and 14th forms given in the Code, (pp. 552-3,) and in all.

Section 2129 supports this view. It provides that a suit on such a note as is described in the complaint, "must be prosecuted in the name of the person really interested," and not of the person who has the legal title.—*Crook v. Douglass*, 35 Ala. 693. Certainly, the word "claims" has, at least, the effect of asserting that the plaintiff is the person really interested in the money due on the note; though, in the 9th form, it performs the higher office of an averment of title in the plaintiff to the chattels sued for.

What is the ordinary and legal definition of the word "claim?" Among the definitions given by Webster, are, "to ask or seek; to obtain by virtue of authority, right, or supposed right; to demand as due; *to be entitled to anything as a matter of right; a right to claim or demand; a title to any debt, or privilege, or other thing, in possession of another.*" Bouvier (Law Dic., vol. 1, p. 233) defines it as follows: "A challenge of the ownership of a thing which a man has not in possession, and is wrongfully withheld by another."—Plowd. 359; 1 Dall. 444; 12 S. & R. 179. Burrill gives the following definition: "A challenge or *demand* by *any man* of the property or ownership of a thing, or *some interest* in it, which he has not *in possession*, but which is *withholden* from him wrongfully"; and as "a *demand* of some matter *as of right*; to do, or to forbear to do, some act or thing as a *matter of duty*."—16 Pet. R. 539-615; 4 Sandf. Ch. R. 38; 2 Comstock, 245-254. Mr. Jacob defines it as

“a challenge of interest in anything that is in the possession of another.”

These definitions clearly show in what sense the word “claim” was used by the learned codifiers, in the forms referred to; that is, that thereby the plaintiff asserts in himself the ownership of, or the right to, the money due on the promissory note, which money he has not in possession, and which is wrongfully withheld by the defendant; or, when the suit is “for the recovery of chattels in specie”, that the ownership of, or right to them, is in him, but the possession is wrongfully withheld by the defendant. The legal title to a promissory note may be in one person, but another may sue to recover the money due on it, if he is the person “really interested” in it, and he alone “must” sue.—Code, § 2129. As to the effect of the word *claim*, see the last paragraph of the opinion in the case of *Roberts v. Fleming*, 31 Ala. 683.

Section 2405 of the Code is as follows: “No judgment can be arrested, annulled, or set aside, for any *matter* not previously objected to, if the complaint contain a *substantial cause of action*.” The meaning of the words “matter”, “substantial”, and “cause of action”, must be ascertained, to understand this section, as also sections 2161, 2227, 2228, and 2402. Bouvier defines the word “*matter*” thus: “Some substantial or essential thing, opposed to form.” The word “substance”, from which the words “substantial”, and “substantially”, are derived, he defines as “that which is essential; it is used in opposition to form.” He defines the phrase “cause of action” thus: “A right to bring an action, which implies that there is some person in existence who can assert, and also a person who can lawfully be sued.” Now, let us construe all the sections of the Code referred to together, keeping in view the above definitions of the terms used therein, and deduce the legal conclusion that results therefrom. It seems clearly to be, that “the party really interested” in the money due on a promissory note must prosecute the suit for its recovery; that the word “claims”, in the complaint, is equivalent to an averment that the plaintiff is the party really interested in the recovery of the money, though the complaint shows that the note is

payable to another; that, at least, the promissory note is "a substantial cause of action" against the defendant, and even if the right of the plaintiff to the money due on it is defectively averred, yet, there being a judgment by default, and the defect being "matter" not previously objected to, (taking the meaning of the word "matter" as above defined by Bouvier,) the judgment should not be set aside or reversed by this court; for, there is, as before stated, at least, "a substantial cause of action" as against the defendant, to support the judgment.

If section 2405 reaches only formal defects, what was the use of section 2402? If it was intended to cure matters of substance, what matters of that description are cured by it after judgment? In my judgment, it was intended to heal and cure all "*matter*" (in its legal sense) not previously objected to, where there was one "substantial cause of action" alleged. But the case is not reduced to this dilemma. The word "claims", in this complaint, actually fulfills the other requirement of the law, and asserts the right of the plaintiff to the money due on the note, and thereby shows *a perfect right of action in the plaintiff, against the defendant.*

There is no case among the decisions of this court, in which the legal import of the word "claims", as used in the forms, has been considered and defined; the question having uniformly been the sufficiency of the forms prescribed by the Code as legal enactments, and not what their terms imported. The codifiers were eminent and "learned in the law", and they certainly knew what the word "claims" signified in law, and were *not oblivious* of the fundamental rules of the common law as to pleadings; and therefore they used that word in the 4th, 5th, 9th, 14th, and other forms of the Code, in its legal sense, and knew that it performed the double office, which no other word did, of an averment of the beneficial interest in, or title to, the subject-matter of the suit, in the plaintiff, and also of a breach of a contract or duty by the defendant, or that the thing sued for "was wrongfully withheld by the defendant", as above defined.

In the case of *Crimm v. Crawford*, (29 Ala. 623,) the

court say : "The complaint in this case is in pursuance to the form prescribed by the Code. These forms have the force of law." This decided the sufficiency of the complaint in that case ; yet the court go on, without considering or defining the meaning of the word "claims", and say that "by the Code, all averments as to title are dispensed with." Suppose this mere *obiter dictum* to be correct ; still such averments are "dispensed with", if at all, "by the Code", and as much in *this case* as any other, under the influence of section 2228. Then, whether this view or mine is correct, the complaint in this case is good, at least, after judgment by default, under section 2405. But, to hold that the Code dispenses with "all averments as to title", would place the codifiers, as lawyers and legislators, in a very equivocal, if not absurd and ridiculous attitude ; adopting legal forms without meaning or substance, without an averment of title in the plaintiff, or breach of duty by the defendant. *Argumentum ab impossibili valet in lege.*

Now, let us turn our attention to the decisions of this court. In the case of *Blount v. McNeill*, (*supra*,) the suit was commenced on the 5th February, 1855, founded on three promissory notes, one of which was not due until the 1st March afterwards ; and a judgment was rendered on the 14th April, 1855, for the full amount thereof. This court said, that a defense might have been made in the court below, to a part of the matter embraced in the declaration, but that the declaration contained "a good cause of action" ; and, speaking of the defense to a recovery on the note not due when the suit was commenced, the court say : "Such a defense is not available in this court, when no objection was in any way made in the court below. Code, § 2405."

In the case of *Stewart v. Goode & Ulrick*, (*supra*,) among the assignments of error were these : "In allowing the assignee of the note to sue in his own name, on an assignment made after the action was brought." "6th, The complaint is insufficient, because it does not allege that the note is 'still unpaid,' as required by the forms of the Code." "7th, The complaint does not show that the plaintiff had any cause of action when the suit was commenced, while

the summons stands as it was when issued, and the plaintiffs therein not changed." And the court, in passing on these, and other similar questions, used this language: "The complaint shows a substantial cause of action, and although the defects *attributed* to it by the appellant might have been available on demurrer, advantage cannot be taken of them in this court, when no objection was in any way taken in the court below." Now, if "the defects attributed" could not avail on appeal, where there is a substantial cause of action, what does the case decide, if it is not that the note sued on was a substantial cause of action, although the right of action was not averred to be in the plaintiff when the suit was brought, and in *fact* was not, and that the judgment by default was irreversible?

In the case of *Mahoney v. O'Leary*, (*supra*,) the summons having been issued on the day the note became due, the court held that the suit was "prematurely brought;" and cited 2 Porter, 286, and 5 *ib.* 73. In a very terse and able opinion delivered by STONE, J., speaking of the case of *Randolph v. Cook*, (2 Porter, 286,) the court say: "This court, in this case, consulted the writ, and, because its date showed the suit to have been prematurely brought, reversed the case. That case was decided under the statute of 1824, (Clay's Dig. 322, § 53,) which enacts as follows: 'No cause shall be reversed, arrested, or otherwise set aside, after verdict or judgment, for any matter on the face of the pleadings not previously objected to; *provided*, the declaration contains a substantial cause of action, and a material issue be tried thereon.' " As the court, under the practice existing at the time of the decision of the case of *Randolph v. Cook*, (*supra*,) did look back to the writ, to see if the suit was prematurely brought; *a fortiori*, it was its duty to look at the date and issue of the summons in the case of *Mahoney v. O'Leary*, under the practice then existing, to see if the suit had been prematurely brought.

The court, in the latter case, further say, speaking of the act of 1824: "To bring a case within the healing influence of this statute, the declaration must contain a substantial cause of action, and a material issue must be tried thereon;" and it was held, that the latter element was wanting, and

therefore the act of 1824 did not apply; clearly implying that, if "a material issue had been tried thereon," the declaration and judgment would have been good, though the plaintiff had no right of action against the defendant at the time the suit was brought. The court further say: "It is true the summons in this record bears date March 1; but, under the section of the Code above copied," (2405,) "we have no authority, the complaint being good, to arrest, annul, or set aside the judgment, for *any matter* not previously objected to." This applies to *any matter* on the face of the complaint, as well as matter not so appearing. Now, it is submitted that the court should have looked at the summons, as the court in the case *Randolph v. Cook* looked at the writ, to see whether the suit was prematurely brought, and for a much stronger reason; and that is, the declaration, under the former practice, was not filed until the return term of the writ, and when the suit of *Mahoney v. O'Leary* was commenced, the Code was in force, and required the complaint to accompany the summons, and both to be served by leaving a copy with defendant, who, of course, would see that the plaintiff had no cause of action against him, and might very naturally conclude that it was unnecessary to defend *such a suit* in a court of justice. A strong case.

The cases of *Blount v. McNeill*, and *Stewart v. Goode & Ulrick*, (*supra*,) are cited as authority in *Mahoney v. O'Leary*, and both of them follow *Randolph v. Cook*, in looking to the writ, or summons, to see if the suit was prematurely brought; and this point should therefore be considered as settled.

The case of *Browder v. Gaston & Wellborn*, (*supra*,) was decided prior to *Mahoney v. O'Leary*, and seems to me to be clearly in conflict with that case, and with the cases of *Blount v. McNeill*, *Stewart v. Goode & Ulrick*, and *Crimm's Adm'r v. Crawford*, (*supra*,) It is true, that the facts in each case are different; but in principle the case of *Browder v. Gaston* is in conflict with the other cases. The case of *Browder v. Gaston*, like that of *Crimm v. Crawford*, does not consider and define the meaning and effect of the word "claims." In the cases of *Randolph v. Cook*, *Stewart v.*

Goode, and *Mahoney v. O'Leary*, the plaintiff had no right of action in himself at the time the suit was commenced, and at that time had no cause of action against the defendant; and in *Browder v. Gaston*, there was a substantial cause of action against the defendant; and I hold that the word "claims" asserts a right of action in the plaintiff. But suppose it does not; still, I hold that there was a substantial cause of action contained in the complaint against the defendant, and that therefore the judgment should not have been set aside, or reversed, under the healing influence of section 2405. If otherwise, what does that section mean, and what field of operation has it, when it applies to "matter" not appearing on the face of the complaint, which should so appear, when there is a substantial cause of action contained in it?

To illustrate: If the words in the second form, on page 551 of the Code, "endorsed to the plaintiff," were omitted, still, after judgment by default on such a complaint, the defect would be healed and cured by section 2405. If not, then I am incapable of comprehending what that section effects, when applied to "matter" not appearing on the complaint, which should so appear to give a *perfect right of action*, in a case where one substantial cause of action, and the most material one, is contained in the complaint, and the "matter" omitted has not been previously objected to. The case of *Mahoney v. O'Leary*, in which there was no existing cause of action in the plaintiff, or against the defendant, at the commencement of the suit, is more obnoxious to principle and a wholesome sense of justice, than the case of *Browder v. Gaston*, where there was a good cause of action set out in the complaint against the defendant; and, if my view of the effect of the word "claims" is correct, the complaint is sufficient, and the judgment valid.

These cases being in conflict *on principle*, an election is left to me to follow the case of *Browder v. Gaston*, or the other cases cited; and, as sound reason, and a proper construction of the Code, fully sustain the sufficiency of the complaint in this case, after judgment without objection, I

follow the latter ; and am not reduced to the *dilemma* of overruling a case which has been decided for any length of time, without having a later case, which on principle fully sustains my views. But, if I were, then I might be reduced to the extremity of announcing what amount of veneration I have for decisions in which sound reason and principle are ignored or violated. In differing from the learned court in one case, I am sustained by other opinions of this court, which were concurred in unanimously by the court. The judgment by default should be affirmed. This conclusion, resting on authority, reason, and principle, stands on a firm and fixed foundation.

But, on the other hand, if the following sentences, in the opinion of the court delivered by the Chief-Justice, in the case of *Crimm's Adm'r v. Crawford*, (29 Ala. 623,) to-wit : "Now, it is evident from this form that, under the new system of pleading inaugurated by the Code, all averments as to the title are dispensed with, and, indeed, everything like averment is dispensed with. The only requisite to a good complaint is, to state that the plaintiff claims, and what he claims,"—are to be taken as law, or as *res adjudicata*, then the foundation of my conclusion is equally, if not more firm and fixed. The broad declaration is made, that by the "new system of pleading inaugurated by the Code all averments as to the title are dispensed with," and that the "*only requisite to a good complaint is to state that the plaintiff claims, and what he claims.*" How this can be reconciled with the doctrine or decision in the case of *Browder v. Gaston*, (30 Ala. 678,) is beyond my comprehension, at least upon reason and principle.

COLTART *vs.* ALLEN.

[APPLICATION FOR REVOCATION OF LETTERS OF ADMINISTRATION.]

1. *Grant of administration on estate of decedent who resided in another county.*—A grant of letters of administration by the probate court, on the estate of a decedent who resided in another county at the time of his death, is voidable only, and not absolutely void; and a subsequent grant of letters, by the probate court of the proper county, is absolutely void until the revocation of the former letters, and confers on the person appointed no such interest as will entitle him to apply for their revocation.

APPEAL from the Probate Court of Jackson.

IN the matter of the estate of Jehu W. Geron, deceased on the application of Robert W. Coltart for the revocation of letters of administration previously granted by said probate court to Minerva Allen. The grant of administration to the defendant was made on the 16th December, 1865, under a petition which alleged that the decedent was a resident of Jackson county at the time of his death. On the 8th February, 1866, the probate court of Madison granted letters of administration on said estate to Coltart, who then filed his petition in the probate court of Jackson, asking the revocation of the letters granted to Mrs. Allen. On the evidence adduced, all of which is set out in the bill of exceptions, the probate court dismissed the petition, and refused to revoke the letters of administration. The petitioner excepted to the ruling and decree of the probate court, and he now assigns the same as error.

WALKER, BRICKELL & LEWIS, for appellant.

CHILTON & THORINGTON, and S. F. RICE, *contra*.

A. J. WALKER, C. J.—Administration upon the estate of Jehu W. Geron, deceased, was granted to Minerva Allen, by the probate court of *Jackson county*. Afterwards, admin-

istration upon the same estate was granted to Robert W. Coltart, by the probate court of Madison county. Coltart applied to the probate court of Jackson, to revoke the administration granted by it to Minerva Allen, and based the application upon the allegation, that the intestate was, at his death, an "inhabitant" of Madison county, and not of Jackson county, in which the first administration was granted. Evidence was received as to the inhabitancy of the intestate at the time of his death, and the probate court of Jackson county overruled the motion for a revocation of the administration of Minerva Allen.

The question of the county of the intestate's inhabitancy, depends upon oral and conflicting testimony. Without regard to the merits of that question, the judgment of the probate court must be affirmed. This conclusion is attained as the result of the following propositions: 1st, that the appointment in Jackson county was not void, but voidable, upon the concession that the evidence proves the inhabitancy to have been in Madison; 2d, that the administration in Jackson being merely voidable, the later administration, granted pending the prior, is void; and, 3d, that the application for the revocation of the letters in Jackson county is by a person setting up a void administration, and therefore having no interest in the subject, and was properly overruled for that reason.

The probate court, in granting administration, is a forum of general jurisdiction.—*Ikelheimer v. Chapman*, 32 Ala. 676. The validity of the grant of administration does not depend upon the recital of jurisdictional facts. The order here discloses upon its face no defect of jurisdiction; but it is contended that the want of jurisdiction may always be shown by testimony extrinsic of the record, and that the order is thus demonstrated to be void. This may be true, when the question is as to jurisdiction over the subject-matter, which is bestowed by the law, and can not be conferred by consent. But such is not the question here. The constitution gives a general jurisdiction to grant administration. This is the source of the jurisdiction over the subject. The statute distributes the cases arising under that grant among the different courts of the State according

to locality. The locality of the court, therefore, concerns jurisdiction of the case, which is distinguishable from jurisdiction over the subject-matter. The court having jurisdiction over a certain class of cases, its error in adjudging some particular case belonging to that class, which properly pertains to a court of the same authority in another locality, does not make the judgment void, but simply voidable by a direct proceeding for that purpose. The question has been repeatedly so decided by courts and jurists of the highest repute, upon reasoning which ingenuity can scarcely oppose.—*Burnstead v. Read*, 31 Barb. 661; *Dyckman v. Mayor*, 1 Sel. 443; *Raborg v. Hammond*, 2 Har. & Gill, 42; *Wilson v. Ireland*, 4 Md. 444; *Ex parte Barker*, 2 Leigh, 719; *Andrews v. Ivory*, 14 Gratt. 229; *Fisher v. Bassett*, 9 Leigh, 119; *Burnley v. Duke*, 2 Rob. 103; *Burdett v. Slisbee*, 15 Texas, 505; *Petigru v. Ferguson*, 6 Rich. Eq. 378; *Clapp v. Beardsley*, 1 Vermont, 151; Washburn's Digest, 407, § 1; *McFarland v. Stone*, 17 Vermont, 165. The argument of the point is fully set forth in the cases cited, and in Lomax on Executors, vol. 1, pp. 349, 350, 351.

The doctrine, that an administration granted in a county other than that prescribed by the statute is voidable, commends itself by its conservatism, and its avoidance of the bad consequences of the opposite doctrine. Where the question is, as here, one of doubt as to the county to which the administration belongs, there may be two administrations; debtors may be subjected, by the verdicts of different juries, to two judgments for the same debt; and great confusion and injury may result, if an administration can be collaterally assailed upon such ground.

There are decisions in this State, to the effect that an administration is absolutely void, when the testator died and resided in another State, and there were no assets in this State.—*Bradley v. Broughton*, 34 Ala. 694; *Miller v. Jones*, 26 Ala. 247; *Treadwell v. Rainey*, 9 Ala. 59; *Gayle v. Blackburn*, 1 St. 429. These decisions were made in reference to cases where there was no ground of jurisdiction in any court of the State. Here, the question is simply as to which of two courts, of precisely the same jurisdiction, should take cognizance of the case. There is no decision

in this State opposed to the propositions of this opinion. It is admitted that there are several decisions in other States, which are in conflict with our argument; but they are wrong in principle, and opposed by the decisions which are above cited, and by the authority of Lomax, an able writer on the subject of executors and administrators.

The administration in Jackson county was valid until it was vacated, even if it was wrongfully granted. There can not be two valid administrations upon the same estate, within this State, at the same time. The administration in Madison was, therefore, void. The point was expressly so decided in *Petigru v. Ferguson, supra*. It is argued for the appellant, that notwithstanding the administration in Jackson county may have been valid until set aside in a direct proceeding, the administration in Madison would be valid; and we are referred as authority for the position to 1 Comyn's Digest, 494, *Administrator, B, 3*; where it is said, that "after an administration by the archbishop, if the bishop to whom it belongs grant administration, and then the first administration is repealed, the administration granted before the repeal stands good." To support this doctrine, *Sir John Needham's case*, (8 Co. Rep.) is referred to by Comyn. To the understanding of that case it is necessary to observe, that, in England, the appointment of an administrator appertained to the prerogative court of the archbishop of the province, where there were *bona notabilia* in two or more dioceses; but to the court of the bishop of the diocese, where there were *bona notabilia* only in that diocese.—Roger's Eccl. Law, 967. In *Sir John Needham's case*, an administration was granted by the prerogative court; afterwards, administration was granted by the proper ecclesiastical court of the diocese; and after that, the prior administration by the prerogative court was pronounced and declared void, "*pro nulla et invalida ad omnem juris effectum*." It was adjudged, upon a collateral attack upon the validity of the prior administration, that it was in truth voidable only, but must be treated as void absolutely, because it had been so declared by a judgment, to which credit must be given. The prior administration being treated as void, the subsequent administration was held to

Coltart v. Allen.

be valid. The decision is not an authority, that a second valid administration can be granted pending one which is merely voidable. It is said in that case, that the authority of the second administration is suspended until the first is revoked. However the law upon the subject may have been under the English ecclesiastical system, it is not at all certain that, under our system, a grant of administration could be made, which, though not effective at the time, might take effect at some future time, upon the revocation of the prior administration. But, conceding that the administration in Madison was merely suspended, until the former administration in Jackson was revoked, the authority of the administrator under the latter grant would await the revocation, and he could not make the motion for revocation. He would have no authority until the revocation was made.

Affirmed.

BYRD, J.—After a careful examination of the record, we are satisfied that the grant of administration to appellee, by the probate court of Jackson county, is not void; and this conclusion being arrived at, it follows that the probate court of Madison county had no authority to grant administration on the same estate, so long as the grant by the probate court of Jackson county was unrevoked or unreversed. If the courts had concurrent jurisdiction as to the subject-matter—that is, the grant of letters of administration of deceased persons—the court which first assumed jurisdiction must, *ex necessitate rei*, be exclusive, at least until the action of the first court which took jurisdiction is set aside and annulled. It follows, that the grant of letters to Coltart conferred on him no authority, nor any interest which authorized him to institute this proceeding to vacate and revoke the letters of administration granted by the probate court of Jackson county to appellee; and for this, if for no other reason, the judgment of the probate court on this proceeding must be affirmed, on the authority of the cases of *Burdett v. Silsbee*, 15 Texas, 604; *Burnstead v. Read*, 31 Barb. 661.

EX PARTE STICKNEY ET AL.

[APPLICATION FOR PROHIBITION TO CIRCUIT COURT.]

1. *Attachment for contempt.*—When a stranger to a pending suit interferes with the property in controversy while it is in the custody of the law, the circuit court has jurisdiction to make an order, requiring him to be taken into custody by the sheriff, and to be retained in custody until he shall have delivered the property to the sheriff, and paid the costs of the rule against him; and he cannot purge himself of the contempt by setting up the invalidity of the levy on the property, or showing that the court had no jurisdiction of the particular case.
2. *When prohibition lies.*—The writ of prohibition being an extraordinary remedy, to be resorted to only when there is no other remedy, and to be issued at the discretion of the court, it will not be awarded to the circuit court, at the instance of a stranger to a suit there pending, to vacate a rule for contempt against him on account of his interference with the property in controversy.

APPLICATION by H. G. Stickney, William Owens, H. C. Caulkins, and J. W. Bennett, for the writ of prohibition, or other remedial process, to be issued to the circuit court of Montgomery, for the purpose of vacating and setting aside an order made by that court at its December term, 1865, (Hon. F. BUGBEE presiding,) in the matter of an alleged contempt. The material facts of the case, as shown by the transcript, which was made an exhibit to the petition, are these:

On the 10th day of July, 1865, an attachment was issued by J. H. Nettles, a justice of the peace in and for Montgomery county, at the suit of E. H. Wilson, against the Bank of Louisiana, a corporation chartered under the laws of Louisiana. The attachment was issued by said Nettles, under the authority of an order from Major-General A. J. Smith, who was then in command of the sixteenth corps of the United States army, with his head-quarters at Montgomery; which order was directed to said Nettles, as a justice of the peace, authorized him to issue an attachment in the case named, "and to appoint the necessary bailiffs to

execute the necessary process, levying the same upon any property of said bank within your" [his] "jurisdiction, upon proper affidavit and bond being filed"; and directed him to "make the writ returnable to the first properly organized court under the laws of the United States, having jurisdiction in such cases." The ground on which the attachment was sued out, as stated in the plaintiff's affidavit, was, that the defendant had not sufficient property in Louisiana with which to satisfy the plaintiff's debt; and the usual statutory bond was given. The attachment was made returnable to the next term of the circuit court of the county, and W. H. Ogbourne was appointed bailiff by said Nettles, under the authority of General Smith's order, to execute and return it; and it was levied by said bailiff on one hundred and ninety-eight bales of cotton, which were then stored on the plantation of Julius C. B. Mitchell in said county.

The cotton on which said attachment was levied was sold by said Mitchell, in the fall of 1862, to an agent of the said Bank of Louisiana, at fourteen cents per pound; and the price was paid in treasury-notes of the Confederate States. The contract of sale was made in Montgomery, and the price paid was the market value of the cotton at the time. "When said sale was made, said Mitchell agreed with said agent to put said cotton under a good shelter, and to hold and keep it for said bank, under a good shelter, until called for by said bank, and then to haul it to any ware-house in the city of Montgomery that might be designated by said bank or its agent; for which just compensation was to be made to him." At the time this contract was made, New Orleans was held by the military forces of the United States. On the 6th December, 1865, Mitchell sold all his "interest" in said cotton to E. C. Avery, J. C. Harris, and H. C. Caulkins, at the price of ten thousand dollars in treasury-notes of the United States, which was about one-fourth of its value; the said purchasers being informed at the time of all the facts connected with the former sale. Said Avery, Harris, and Caulkins, being advised by their attorneys to take possession of the cotton, if they could obtain it without resistance, sent their agents, with wagons,

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to said Mitchell's plantation, on the 12th December, 1865; and said agents, meeting with no resistance from the person who was in charge of the cotton, placed seventy-three bales on their wagons, hauled them to Montgomery, and stored them in the ware-house of W. D. Carpenter & Co. J. W. Bennett acted as the agent of said purchasers in removing and storing the cotton, and received from Stickney and Owens, who were the keepers of the ware-house, the usual ware-house receipts, which he delivered to said Caulkins.

The plaintiff filed his complaint in the attachment suit on the 25th November, 1865. On the 6th December, 1865, a day of the next regular term of the court, Messrs. Martin & Sayre, as *amici curiæ*, moved the court for a rule against the plaintiff, to show cause why the attachment should not be dismissed, on the ground that said Nettles had no authority to issue it; also, to dismiss the levy, on the same ground; and for a rule against the bailiffs who had made the levy, "to show cause why they will not allow the defendant to replevy the cotton levied on"; which several motions the court overruled and refused. On the same day, on motion of Martin & Sayre as *amici curiæ*, the court made an order directing the bailiffs to place the cotton in the possession of the sheriff; and, on motion of the plaintiff, ordered a sale of the cotton by the sheriff, as perishable property. On the 15th December, 1865, the following order was made in the cause:

"This day came into open court, before the court now here, Edward H. Wilson, by his attorneys, and moved the court for the issue, forthwith, of a rule against H. G. Stickney, William Owens, H. C. Caulkins, and J. W. Bennett, to show cause why an attachment should not issue against them for a contempt of this court, its order, process, and authority. And it being made to appear to the court now here, by competent proof, that the said H. G. Stickney, William Owens, H. C. Caulkins, and J. W. Bennett, have in their possession seventy-three or more bales of cotton, of great value, to-wit, of the value of thirty thousand dollars, which said seventy-three or more bales of cotton, with other cotton, were levied upon by W. H. Ogbourne, a spe-

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cial bailiff in that behalf duly and legally appointed and authorized, on the 11th day of July, 1865, by virtue of, and in obedience to an attachment, at the suit of Edward H. Wilson, against the Bank of Louisiana, a corporation organized under the laws of the State of Louisiana; which attachment, with the levy thereon endorsed, is now in this court, and to which, with the proceedings thereon had by this court, sanctioning said levy, and ordering said cotton to be turned over to the sheriff of this county, and to be by him sold, are hereby referred to for greater certainty; and which attachment is still pending and undecided: And it being further made to appear to the court now here, that while said cotton was in the custody of the law, in the possession of said Ogbourne as special bailiff, by virtue of the levy under the authority aforesaid, and before he had complied with the order of this court, (the said cotton being then at the residence of Julius C. B. Mitchell, in said county of Montgomery,) the said seventy-three or more bales were taken, in contempt of the authority of this court, out of the legal custody of said Ogbourne, and are now held by the said Stickney, Owens, Caulkins, and Bennett, who retain the same, and refuse to deliver them to the said Ogbourne, or to A. H. Johnson, the sheriff of Montgomery county, in contempt of this court; so that, in virtue of such contemptuous conduct of the said Stickney, Owens, Caulkins, and Bennett, in detaining, holding, and refusing to deliver said cotton, either to said sheriff, or to said Ogbourne, that he may deliver the same to said sheriff, the orders of this court, made in said cause, requiring said Ogbourne to turn over said cotton to said sheriff, and requiring said sheriff to return the facts to this court, and to sell said cotton so turned over to him, cannot be carried out: And the court being fully informed, by competent proof, that the said Stickney, Owens, Caulkins, and Bennett, by unlawfully detaining the said cotton, and refusing to turn the same over as aforesaid, are guilty of unlawful interference with the proceedings of this court, and are in contempt of its authority, process, and commands: It is therefore ordered and adjudged, that a rule issue, requiring the said H. G. Stickney, William Owens, H. C. Caulk-

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ins, and J. W. Bennett, forthwith to appear before this honorable court, and show cause, if any they have, why an attachment should not issue against them for the contempt aforesaid."

The next minute-entry in the record, dated December 30, 1865, recites that the *defendants* in the rule appeared, in person and by attorney, "and moved the court to quash the rule served upon them in this case, for defects apparent on its face; which motion, having been duly considered by the court, was overruled; and thereupon said defendants filed their demurrer to said rule; and the said demurrer, and the causes therein assigned, having been considered and fully understood by the court, it is considered by the court, that said demurrer be, and the same is, disallowed and overruled." The demurrer, as copied into the transcript, purports to be filed by only three of the defendants in the rule, the name of Caulkins being omitted; and the grounds of demurrer therein assigned are—"1st, because it does not appear from said rule, or from the record in said cause, or from any of the proceedings of said court, or from any affidavit therein, that they have been guilty of any contempt of said court, its order, authority, or process, or that any matter has been averred or charged against them, or either of them, which could give said court jurisdiction to proceed against them, or either of them, for contempt; 2d, because said court has no jurisdiction to require them, or either of them, to answer as for a contempt, or on account of the matters set up and alleged, or recited in said rule."

After the overruling of their demurrer, a joint answer was filed by Stickney, Owens, and Bennett, in which they averred, on information and advice, that the Bank of Louisiana had no valid claim to the cotton; that the attachment was never levied on said cotton, either in fact or in law; that the cotton was never in the possession of said Ogbourne as bailiff, nor of the sheriff of said county; that it was not taken from the possession of either of them; that said Ogbourne never had authority, as special bailiff or otherwise, to seize, levy on, or take possession of said cotton; that the cotton was hauled to Montgomery, in

wagons sent out by said Avery, Caulkins, and Harris, who acted under legal advice; that the son and agent of the plaintiff, who was also the agent of Ogbourne, was present at the removal, and interposed no objection; and that it was stored in the ware-house of W. D. Carpenter & Co., which was kept by said Stickney and Owens, by the directions of the said Avery, Caulkins, and Harris. Bennett further answered, that he had delivered the ware-house receipts to said Caulkins, as one of the parties for whose benefit the cotton was stored, and that he had neither the possession nor the control of either the cotton or the receipts, and claimed no interest in either. Stickney and Owens further answered, that the receipts which they had given for the cotton, specified on their face that the cotton was to be delivered on the production of the receipts; that they were advised by counsel, if they delivered the cotton to either Ogbourne or the sheriff, that they would thereby render themselves liable for its value to the parties who held the receipts; that they had no interest in the cotton, except a claim for storage, which neither Ogbourne nor the sheriff offered to pay; and that they held themselves ready to deliver the cotton to the parties entitled, on the production of their receipts, and the payment of their claim for storage. Caulkins adopted the answer of the other defendants, and further averred that he claimed and held the cotton, as joint owner with said Avery and Harris, under a title which they were advised was legal and valid.

A further answer was filed by the four defendants jointly, which, as set out in the record, purports to have been sworn to by them, before the clerk of the court, on the 29th December, 1865, and which contained the following averments: "When said cotton was demanded of said defendants, on or before the 18th December inst., they did not know that said orders had been made, requiring said Ogbourne to turn over said cotton to said Johnson, and requiring said Johnson to sell said cotton. On or before the 18th December inst., when said rule was first issued, said Ogbourne did demand fifty-two bales of said cotton from said Bennett, Owens, and Stickney; but he did not disclose to them in what character, or by what right, he

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demanded the same. On the 27th December inst., another demand of seventy-three bales of cotton was made by said Ogbourne, of each of said defendants, as special bailiff, and by said Johnson as sheriff; and when said defendants heard, verbally, from said Ogbourne and Johnson, of said orders of this court, they requested said Ogbourne and Johnson to show their authority, or orders, for demanding said cotton; and said Ogbourne and Johnson, in reply to such request, stated that they had no written authority to demand said cotton. For the reasons above stated, and because they were advised and believed that neither said Ogbourne nor said Johnson had any right to demand or receive said cotton, said defendants refused to deliver the same to them on said demand. Said Caulkins further states, that he holds the ware-house receipts for said cotton by said Stickney and Owens. Said Stickney, Bennett and Owens, first heard of said orders to turn over and sell said cotton, on the argument of the demurrer to said rule, to-wit, on the 22d December inst.; and said Caulkins first heard of said rule, from said Ogbourne and Johnson, when said last demand was made on the 27th inst. At the time said cotton came into the possession or control of said defendants, or either of them, they did not know that said court had made any order requiring said Ogbourne to turn over said cotton to said Johnson as sheriff, or for the sale of said cotton."

On the hearing under the rule and answer, as the bill of exceptions shows, the facts above stated were proved to the court; and it was further proved, that said Ogbourne and the sheriff, when demanding the cotton from the defendants, informed them of their official character, and of the purpose for which they wanted the cotton. The bill of exceptions purports to set out all the evidence that was before the court on the hearing. The judgment-entry, after stating the several rulings of the court on the pleadings, proceeds thus—"And the proof having been submitted to the court as to the allegations contained in said rule, and argument being thereupon had, it appears to the court that the statements and allegations in said rule contained and set forth are fully proved, and that the said defendants

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are in contempt of the authority of this court, its process, and orders, as set forth in said rule, and that said defendants have in their possession seventy-three bales of cotton, being so much of the cotton levied on, and in the possession of this court, under the levy of the said attachment of E. H. Wilson against the Bank of Louisiana, and which said seventy-three bales of cotton they refuse to deliver back to the officer of this court duly authorized to receive the same; which refusal on their part was made, and is persisted in, after a full knowledge of all the orders of this court made with reference to said cotton: It is therefore ordered and adjudged by the court, that said defendants be taken into the custody of the sheriff of the county, and that they be retained in custody by him until they shall turn over to him, as such sheriff, the said seventy-three bales of cotton, and shall pay the costs of the rule against them."

The defendants reserved an exception to the order and decision of the court; and they now apply to this court, by petition, for a writ of prohibition, or other remedial process, to vacate and annul it.

WATTS & TROY, for the motion.

GOLDTHWAITE, RICE & SEMPLE, and CHILTON & THORINGTON, *contra*.

BYRD, J.—1. This is a motion or application for a writ of prohibition, or other original and remedial writ, against the circuit court of Montgomery county, to correct or vacate an order of that court, by which the applicants are sentenced to be imprisoned for a contempt of the authority of that court, in a matter pertaining to a suit pending therein, to which they are not parties, and by which order they are to be imprisoned, "until they turn over to the sheriff seventy-three bales of cotton, and pay the costs of the rule against them."

The transcript shows that the proceeding in the court below was against the applicants for a contempt, and the judgment thereon is clearly authorized by the Code, (ch. 1, title 9, part 1,) and the common law.—*Gates v. McDaniel*, 3 Porter, 356; *Yates v. Lansing*, 9 Johns. 395; 4 Johns. 317;

People v. Compton, 1 Duer, 512; *Ex parte Adams*, 25 Miss. 883; *Passmore Williamson's case*, 2 Casey, 23; 3 Lord Raym. 1108; *Kearney's case*, 7 Wheat. 38; *Crossbey's case*, 3 Wilson, 183; 3 Term R. 253; 1 Dal. 15; Hawk. P. C., b. 2, § 33; 2 Va. Cas. 408. It is not shown that the applicants were actually in custody when this motion was made, nor that they were unable to deliver the cotton under the order of the circuit court. The bill of exceptions must be construed most strongly against them, and, in doubtful matters, most favorably to sustain the action of the court below. The record does not show that they were attached, or have ever been in the custody of the sheriff prior or subsequent to said order: and if it did, still they can discharge themselves by turning over the cotton, and paying the costs of the rule.—*Ex parte Cohen & Jones*, 5 Cal. 494.

A stranger to a suit, against whom a rule has issued for a contempt of court as to his conduct in reference to the orders or process made or issued in the suit, cannot purge himself of the contempt, by showing that the court had no jurisdiction of the particular suit, where the court is one of general jurisdiction, and the suit is one within the scope of its jurisdiction.—*Passmore Williamson's case*, 2 Casey, (26 Penn. R.) 31; *Clarke v. The People*, 1 Breese, 266; 1 Blackf. 166; 1 J. J. Mar. 575; 7 Wheat. 38; *Cabot v. Yarborough*, 27 Geo. 476; *Ex parte Perkins*, 18 Cal. 60; 14 Ad. & Ellis, 558; 1 Carter, 160; 4 John. 325; 6 John. 503; 9 John. 423; 5 Ired. 190, 153; 2 Sandf. 724; 1 Hill, 170; 25 Miss. 836; 2 Wheeler's Crim. Cases, 1; *Ex parte Cohen & Jones*, 5 Cal. 494.

In the case of *Passmore Williamson*, *supra*, Judge Black, in delivering the opinion of the court, says: "The proposition, that a court is powerless to punish for disorderly conduct, or disobedience of its process, in a case which it ought ultimately to dismiss for want of jurisdiction, is not only unsupported by judicial authority, but we think it new, even, as an argument at the bar. We ourselves have heard many cases through and through, before we became convinced that it was our duty to remit the parties to another tribunal. But we never thought our process could be defied in such cases, more than others. There are some

proceedings, in which the want of jurisdiction would be seen at the first blush ; but there are others, in which the court must inquire into all the facts, before it can possibly know whether it has jurisdiction or not. Any one who obstructs or baffles a judicial investigation for that purpose is unquestionably guilty of a crime, for which he may and ought to be tried, convicted, and punished. Suppose a local action to be brought in the wrong county ; this is a defense to the action, but a defense which must be made out like any other. While it is pending, neither a party, nor an officer, nor any other person, can safely insult the court, or resist its order. The court may not have power to decide upon the merits of the case ; but it has undoubted power to try whether the wrong was done within its jurisdiction or not. Suppose Mr. Williamson to be called before the circuit court of the United States, as a witness, on a trial for murder alleged to have been committed on the high seas ; can he refuse to be sworn, and, at his trial for contempt, justify himself, on the ground that the murder was in fact committed within the limits of a State, and therefore triable only in a State court ? If he can, he can justify perjury for the same reason. But such a defense, for either crime, has never been heard of since the beginning of the world." The true rule seems to be, that the want of jurisdiction of the particular case, in which the contempt was committed, is no defense or justification, where the court is one of general jurisdiction, and has jurisdiction to entertain such a suit. Some authorities go even beyond the limits of the rule as stated above.

2. If the applicants have any title to the cotton, they can return it, and bring an action to try the title in the legal and constitutional *forum*. Writs of *mandamus* and prohibition are extraordinary, though not extra-judicial remedies, to be resorted to *only* where there is no other remedy, and to be issued at the discretion of the court. *Ex parte Greene & Graham*, 29 Ala. 57 ; *Ex parte Smith*, 23 Ala. 94 ; 17 Ala. R. 527 ; *Ex parte Walker*, 25 Ala. 81 ; 20 Ala. 330, 592 ; 24 Ala. 91 ; 26 Ala. 170 ; 28 Ala. 50 ; 29 Ala. 71.

After a court of general jurisdiction has decided that it

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has jurisdiction of a particular case, it would, in our opinion, be a loose and unsound adjudication to hold, that if a third person could, while the case was pending, acquire an interest in the suit, that he should be permitted in any form to raise the question of the jurisdiction of the court over the subject-matter thereof, in any proceeding against him for a contempt of court in intermeddling with the subject-matter of the suit. A due respect to the orders and dignity of such a court requires a more stringent and conservative rule.—*Passmore Williamson's case*, 2 Casey, 21, and authorities cited therein; 5 Cal. 494.

These views dispose of the motion in this case, without adjudicating any question which affects the merits of the original suit, or the rights of any of the claimants to the cotton in controversy. Questions of title can scarcely, if ever, be adjudicated upon applications of this character. 11 Ala. 268; *Knuckles v. Mahone*, 15 Ala. 212.

It results that the motion is denied.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application by the petitioners' counsel for a rehearing, the following opinion was delivered:

BYRD, J.—After a careful examination of the application for a rehearing in this cause, we have come to the following conclusion. The case of *Cawthorn v. Knight*, 11 Ala. 268, decides, that a levy cannot be set aside, at the instance of a stranger, on the ground that the property levied upon belonged to such stranger, and not to the defendant. This decision is based upon the doctrine, that the stranger must resort to his action for any wrong done to him, and that the question of title could not be tried and determined in that collateral manner. This decision is, in our judgment, eminently wise, and we abide by it. The principle of this decision prohibits an investigation of the title to the cotton, in resisting an order for the delivery of the cotton under penalty of an attachment for contempt.

Upon the motion of the applicants, as shown on the motion docket, the court are unanimously of the opinion, that the decision heretofore rendered in this case, upon the princi-

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ples announced in the opinion, and as herein before set out, fully meet all the questions raised by the applicants for a rehearing, and that the original opinion of the court contains a correct announcement of principles applicable to this case.

Let the application be denied, at the costs of the applicants.

WORLEY'S ADM'RX vs. HIGH'S ADM'R.

[BILL IN EQUITY FOR SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.] •

1. *Construction of will, as to discretionary powers of executor and rights of widow on her second marriage.*—Where a testator directed that the greater part of his estate should be held and retained by his executor, for the use and support of his wife and children, until his youngest daughter attained the age of sixteen years, and should then be sold, and the proceeds divided equally among his wife and children; that, in the event of the second marriage of his wife before his youngest daughter attained the age of sixteen years, the property should be sold, rented, or hired out, as his executor might think most beneficial to the interest of his wife and children; and that his wife should, in either case, receive a child's part,—*held*, that the purpose for which the estate was to be retained by the executor, and the widow's right to the use of the property in common with the children, ceased on her second marriage; and that the discretionary power of the executor to rent or hire out the property, after that event, did not continue for a longer period than was necessary, under all the circumstances of the case, to bring the estate to a final settlement.
2. *Presumption of settlement of estate and payment of legacies, from lapse of time; staleness of demand.*—After the lapse of twenty years from the time when an executor or administrator may be cited to a final settlement, a final settlement of the estate, and the payment of the legacies or distributive shares, will be presumed; and a court of equity will not, in the absence of peculiar circumstances, entertain a bill to compel a settlement and distribution after that time.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JOS. R. JOHN.

THE bill in this case was filed on the 8th June, 1855, by Edward High, as the administrator of his deceased wife Nancy, who was a daughter of Adonijah Worley, deceased, against Mrs. Frances Worley, who was the widow and administratrix with the will annexed of said Adonijah; and sought a settlement and distribution of the estate of said Adonijah according to the provisions of his will. The said testator died in Dallas county, the place of his residence, between the 11th January, 1830, and the 14th February, 1831. His will, which was dated the 11th January, 1830, and duly admitted to probate after his death, contained the following provisions:

"I desire to be decently buried; after which I desire, that all sums due to me, in any manner whatsoever, may be collected with as little delay as possible, and that all just debts due by me may be paid as early as the means of doing so from collections will permit; and believing that there is not a sufficient sum due to me to enable my executors to discharge all the demands against me, it is my wish that my negro boy Joseph be sold, as soon after my death as practicable, on a credit of twelve months; and the money, when collected, to be applied to the payment of my notes in favor of the agents of the 'Selma Town Company.' Also, I desire that the brick remaining on hand, together with all the tools of every description whatsoever belonging or appertaining to the brick-yard, may be sold on a credit of twelve months; the proceeds to be applied to the payment of my debts. Also, I desire that the east half of the south-east quarter of section ten, township eighteen, range eleven, may be sold on a credit of twelve months, provided the same can be sold for one hundred dollars. It is my wish and desire, that all the lands which I own adjoining the town of Selma may be held and retained by my executor, for the use and support of my wife and children, together with two female slaves, viz., Eliza and Maria, all the household and kitchen furniture, and the stock of every description whatsoever, until my daughter Fanny Ann shall arrive at the age of sixteen years: then to be sold, and the proceeds equally divided between my wife and children, share and share

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alike. And should my wife again connect herself in marriage before my aforesaid daughter shall have become sixteen years of age, in that case it is my desire, that all the property which at that time may belong to my estate may be sold, rented, or hired out, as my executor may think most for the interest of my wife and children; and, in either case, my wife is to receive a child's part. As my estate is not of a value that will exempt my children from labor, it is my desire that each of my sons shall learn some trade. I therefore desire, that my executor will, as they shall severally arrive at the age of sixteen, permit them to make choice of such trade as they may prefer, binding them for such length of time as he may deem necessary for them to acquire a proper knowledge of the business they propose to learn."

The executor named in the will having refused to qualify, letters of administration on the estate, *cum testamento annexo*, were granted to Mrs. Frances (or Fanny) Worley, the widow of the testator, on the 14th February, 1831. On the 18th February, 1834, Mrs. Worley contracted a second marriage. Fanny Ann Worley, the daughter named in the will, attained her sixteenth year on the 20th January, 1844. The plaintiff's intestate died on the 25th December, 1844, and letters of administration on her estate were granted to him on the 6th June, 1855.

Chancellor CLARK sustained a demurrer to the bill, for want of equity; but his decree was reversed by this court, on appeal, at its June term, 1858, and the cause was remanded.—See the report of the case in 32 Ala. 709–13. On final hearing, on pleadings and proof, Chancellor JOHN rendered a decree for the complainant; and his decree is now assigned as error. The opinion of the court renders it unnecessary to notice the pleadings and evidence.

JONA. HARALSON, for appellant.

GAYLE & BROWN, JNO. T. MORGAN, and W. P. CHILTON, Jr., *contra*.

JUDGE, J.—In the court below, it was averred by way of plea on the part of the defense, and the averment was

sustained by the written admission of the parties, made to be used in evidence on the hearing of the cause, that the widow of the testator intermarried with Nathan D. Worley, on the 18th of February, 1834. What, under the will, was the effect of the marriage of the widow?

When this cause was heretofore in this court, this question was not considered—indeed, was not then presented by the record. The decision then pronounced was on a demurrer to the bill, for the want of equity; and the bill contained no allegation of the marriage in question. Another difference between the case as then presented, and as it now stands before the court, is this: Then, it appeared that Mrs. High died *before* Fanny Ann had arrived at the age of sixteen years; and the decision of the court was based, in part, upon this supposed fact; (*High's Adm'r v. Worley's Adm'rx*, 32 Ala. 709;) while now, it appears that she died about eleven months *after* the arrival of that period. But the view we take of the case renders it unnecessary to consider the effect, if any, of this change.

1. The testator dedicated the whole of his property to the use and support of his wife and children, until Fanny Ann should attain to the age of sixteen years; *provided* his wife did not "connect herself in marriage" before the arrival of that period. If she remained unmarried, the property was to be "*held and retained*," for the use and support of herself and the children, in common, for the period named; then it was to be sold, and the proceeds equally divided between them. But, if his wife should marry before Fanny Ann arrived at the age named, an important change in the condition of the estate was to be effected. In that event, the testator intended that the right of his wife to the use of the property in common with the children should cease, and that the executor should no longer hold it for that purpose; but, that he should, "in that case," "sell, rent, or lease" the property, as he might think "most for the interest" of the legatees; and that "in either case," his wife should "receive a child's part."

The *only* purpose for which the testator authorized his estate to remain unsettled, beyond the period necessary for an ordinary final administration, was, that his wife and

children might have the use in common of the property, for their support, for a specified time. When an event occurred which, by the terms of the will, prevented the consummation of this purpose, there was no authority to postpone a final settlement to any remote particular period. What purpose was to be accomplished by such a postponement? None was named by the testator, and none can be supplied by judicial interpretation, without adding terms to his will.

The power conferred upon the executor, to rent or lease, was not required to be exercised for any specified period; and in conferring this power, it was not intended by the testator that the executor should rent or lease until Fanny Ann should attain to the age of sixteen, *or* that he should retain the property the same length of time for the use and support of the legatees, either one or the other in his discretion. The discretion conferred related exclusively to the selling, renting, or leasing; and if the executor should elect not to sell, but to rent or lease, what was intended by the testator as to the length of time this power should be exercised? It could not have been intended that the duration of the power should rest in the discretion of the executor; and in the absence of any fixed period by the will for its existence, or of any named specific purpose to be accomplished by its exercise, from which the period of its duration might be inferred, the law would hold, that the power could be exercised for such period only as might be necessary, under all the circumstances of the case, to prepare the estate for final settlement, effect a proper sale, and bring the administration to a close.

This construction is in harmony with another important provision of the will, to which effect must be given. The testator directed that his wife should receive, in the event of her marriage, "a child's part;" by which he meant an equal share with the children, severally, of the whole estate. What was intended as to the time when she should receive this share? The will is silent on this question; but it must have been intended that she should receive it as soon as the estate was in condition for the property to be sold for its payment, together with the payment of the respective legacies to the children. The wife of the testator married

ten years before Fanny Ann arrived at the age of sixteen. This marriage, by the terms of the will, as we have seen, excluded her from all participation in the use and enjoyment of the property of the estate; and if not entitled to receive the legacy bequeathed to her, in the event of her marriage, until Fanny Ann should attain to the age named, then, for the period of ten years, the wife would receive nothing. The testator never could have intended the accomplishment of such a result as this. No allotment to her of a child's part, on a partition of the estate without a sale, could have been made; for, as was held by this court in another case between the same parties, one effect of the will in question was, "to transmute the land into personalty, and this gave to each legatee the right to have it sold, and took away from each one the separate right to re-convert his single share, and thus have the sale of a fraction."—*High v. Worley*, 33 Ala. 196. A sale, then, was indispensable, and might have been enforced by the wife to enable her to receive the legacy bequeathed to her; and this, of itself, involved the necessity of a final settlement of the estate, which might have been coerced by either one of the legatees.

2. Having determined that the administratrix with the will annexed might have been called to a final settlement of the estate, on her intermarriage with Nathan D. Worley, the next question is, what effect the lapse of time, which occurred between that event and the date of the commencement of this suit, has upon the cause?

Three years elapsed between the date of the probate of the will, and the date of the marriage of the administratrix. Nancy E. High, appellee's intestate, died ten years after the occurrence of the last named event; and more than twenty-one years elapsed, after the marriage, before the bill in this cause was filed.

As was observed by STONE, J., in *McArthur v. Carrie's Adm'r*, (32 Ala. 75,) "In this, as in most of the States of this Union, there is a growing disposition to fix a period, beyond which human transactions shall not be open to judicial investigation, even in cases for which no statutory limitation has been provided. This period is sometimes longer,

and sometimes shorter; dependent on the nature of the property, and the character of the transaction. By common consent, twenty years have been agreed on, as a time at the end of which many of the most solemn transactions will be presumed to be settled and closed.—See, also, *Rhodes v. Turner and Wife*, 21 Ala. 210; *Barnett v. Tarrence*, 23 Ala. 463; *Gantt's Adm'r v. Phillips*, 23 Ala. 275; *Harvey v. Thorpe*, 28 Ala. 250; *Lay v. Lawson*, 23 Ala. 377; *Milton v. Haden*, 32 Ala. 30; *Wyatt's Adm'r v. Scott*, 33 Ala. 313; *Austin v. Jordan*, 35 Ala. 642. The case of *Blackwell's Adm'r v. Blackwell's Distributees*, (33 Ala. 57,) was excepted from the influence of this presumption, on account of the peculiar facts and circumstances of that case.

These legal presumptions, by which conflicting claims and titles are set at rest, are not always founded on the belief that the thing presumed has actually taken place. "Instead of belief, which is the foundation of the judgment upon a recent transaction, the legal presumption in matters of antiquity holds the place of particular and individual belief."—*Giles v. Barremore*, 5 John. Ch. Rep. 545. Grants have repeatedly been presumed, in England, against the crown; "not that the court really thinks, as Lord Mansfield observed, that a grant has been made, because it is not probable that a grant should have existed without its being upon the record, but they presume the fact for the purpose, and from a principle, of quieting the possession." *Giles v. Barremore*, *supra*; *Eldridge v. Knott*, Cowp. 214; *Hillary v. Waller*, 12 Ves. 252; *Johnson v. Johnson*, 5 Ala. 90. As Chancellor Kent has said, (*Giles v. Barremore*, *supra*,) "These presumptions, to be drawn by the courts, in the case of stale demands, are founded in substantial justice, and the clearest policy. If the party, having knowledge of his rights, will sit still, and, without asserting them, permit persons to act as if they did not exist, and to acquire interests, and consider themselves as owners of the property, there is no reason why the presumption should not be raised."

In the case before us, the lapse of time, dating from a period when the administratrix might have been called to a final settlement of the estate, raises the presumption that the estate has been fully administered, and the respective

legacies paid. The result is, that the decree of the chancellor must be reversed, and the bill dismissed; and the appellee must pay the costs of this court, and of the court below.

BYRD, J., having been of counsel in the court below, did not sit in this case.

HALLIDAY vs. BUTT.

[ACTION ON ACCOUNT, FOR MEDICAL SERVICES RENDERED.]

1. *Original entries on physician's books; admissibility and proof of.*—In an action to recover for medical services rendered by plaintiff as a physician, section 2298 of the Code makes the original entries on his books "evidence for him that the services were rendered", unless their correctness is denied on oath by the defendant in open court; but such entries must nevertheless be identified by competent testimony, and can not be proved by the plaintiff's own oath.
2. *Same.*—In such case, preliminary proof of the identity of the entries must first be made to the court; and if the court decides that they are, *prima facie*, admissible, they must then go the jury as evidence, unless the defendant denies their truth in the mode prescribed by the statute. Proof of hand-writing, *it seems*, is, *prima facie*, sufficient proof of identity.
3. *Physician's diploma; proof of.*—A diploma, granted by any medical college in the United States, is legal evidence of the right of the person to whom it is granted to practice medicine and surgery, (Code, § 977; Session Acts, 1859-60, p. 20,) without proof of the incorporation of the college by which it was granted; and the loss of the diploma being shown, secondary evidence of its contents may be received.
4. *Same.*—The loss of a physician's diploma being shown, the testimony of an officer of the medical college by which it was granted would be competent proof of its grant; but the contents of an order on the records of the college, showing the grant of the diploma, must be proved by an examined copy, and not by the parol testimony of one of the officers.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Jere. Butt, against D. T. Halliday, to recover the value of medical services rendered by the plaintiff as a physician prior to the 1st day of January, 1857; and was commenced on the 1st September, 1858. The only plea was the general issue, and issue was joined on that plea. "On the trial," as the bill of exceptions states, "the plaintiff offered himself as a witness, to testify to the jury that a certain book, which he had, contained the original entries as to the services for which he sued. The defendant objected to allowing the plaintiff to testify to the jury, as thus offered, on the grounds—1st, that said plaintiff was not competent to testify as thus offered; and, 2d, that no notice had been given to him, or to his attorneys, that plaintiff would offer himself as a witness for any purpose. It was admitted on the part of the plaintiff, that no such notice had been given to the defendant, or to his attorneys. This being all the evidence relating to the question of allowing the plaintiff to testify as offered, the court overruled the defendant's objection, and allowed the plaintiff to testify to the jury that the following entries in said book, which he produced, were the original entries made by himself, for the services for which he here sued." (The entries referred to are not set out in the bill of exceptions, and the clerk states that the book is not in his possession.) "To the overruling of said objections, and allowing plaintiff to testify as aforesaid, and allowing said entries to be read in evidence to the jury, each separately, the defendant excepted; but the court, notwithstanding, allowed said entries to be read in evidence to the jury, without any other proof that they were the original entries than the aforesaid evidence of the plaintiff himself; to which rulings of the court the defendant excepted."

"The plaintiff proved the value of the services mentioned in said entries, and that he resided about four miles from the defendant's plantation; and he also testified to the court that he had lost the diploma mentioned in the testimony of Henry R. Frost, which he offered in evidence to the jury, and which was as follows: 'Henry R. Frost states, that he is, and was in 1836, dean of the faculty of the medical college of South Carolina, which is a medical

college in the State of South Carolina ; that he is now, and was then, the keeper of the records of the proceedings of said college ; that there is entered on said records an order, passed by said college in 1836, granting and awarding a diploma to plaintiff ; that said plaintiff [was] graduated at said college in 1836, and a diploma was regularly awarded to him, which was signed by each member of the faculty in his own proper handwriting, sealed with the seal of said medical college, and delivered to said plaintiff, certifying to the plaintiff's proficiency, and that he had attended the regular courses of lectures, and conferring on him the degree of M. D.' Objections were duly made by the defendant to the introduction of each divisible clause of said testimony of said Frost, and also to the whole of said testimony. For instance, defendant objected to the introduction of that part of said testimony which was in these words, 'which is a medical college in the State of South Carolina', on the following grounds : 1st, that it was illegal ; 2d, that it was not competent to prove the establishment of said college by such testimony ; 3d, that there was higher and better evidence of the establishment or existence of said college, if said college existed or had ever been established ; 4th, that said part of said testimony was not admissible to prove matter which appeared from the testimony of said Frost himself to be matter of record ; 5th, that the record of said college, or an examined or certified copy, ought to be produced, or its absence accounted for. These, and other grounds of objection, were duly and fully stated as grounds of objection to each divisible clause of the testimony of said Frost. As the several objections were separately and respectively made by said defendant, each of said objections was overruled by the court ; to each and every of which rulings, overruling said several objections, and also to the admission of each and every divisible clause of said testimony, the defendant excepted. Immediately after the overruling of said objections, the whole of said Frost's testimony was read to the jury by plaintiff ; to which, also, the defendant excepted.

"The foregoing being all the evidence adduced on the trial of the cause, the court charged the jury, that if they

believed the testimony of said Frost, it was sufficient proof that the plaintiff was a regular graduate of a medical college in South Carolina, and that a diploma had been issued to him by said college ; and that if they believed he had rendered the services, and that he had proved the value thereof, the plaintiff was entitled to recover ; to which charge the defendant excepted."

The several rulings of the court to which, as above stated, exceptions were reserved by the defendant, are now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

CLOPTON & LIGON, *contra*.

JUDGE, J.—1. The general rule of the common law is, that a party's books are not admissible in evidence for him ; they are considered as hearsay, of his own fabrication.—1 Phil. Ev. C. & H.'s Notes, 377. This rule of the common law, whatever may be the decisions of other States upon the question, is recognized and enforced in this State.—*Moore v. Andrews & Brother*, 5 Porter, 107 ; *Nolly v. Holmes*, 3 Ala. 642. But, by section 2298 of the Code, it is provided, that "the original entries in the books of a physician are evidence for him, in all actions brought for the recovery of his medical services, that the service was rendered, unless the defendant, in open court, deny upon oath the truth of such entries ; but he is required to prove the value of such services," &c.

This statute being in derogation of the common law, we cannot concur with the court below in the construction, that it gives to the physician suing the right to identify the entries relied on, by his own oath. To make such entries legal evidence, under the section of the Code above quoted, they must be identified by competent testimony. The right of the defendant to deny upon oath their truth does not confer upon the plaintiff the right to swear to their identity ; and in permitting the plaintiff thus to testify, the circuit court erred.

2. The admissibility of such entries in evidence, depends upon the question of identity, which is a preliminary ques-

tion to be determined by the court. Where the admission of evidence *to the jury* depends upon the proof of some fact as a foundation, such fact must be shown *to the court*. *Paysant v. Ware & Baringer*, 1 Ala. 161. But this preliminary proof of identity, given before the judge, does not relieve the party offering the entries from the necessity of proving them to the jury. The judge only decides, as in the case of proving the execution of a deed, whether there is, *prima facie*, any reason for sending the entries at all to the jury.—1 Greenleaf's Ev. § 49; *Larue v. Rowland*, 7 Barb. 107.

Mr. Phillips, in his work on Evidence, says: "Neither the admissibility, nor the effect of evidence, will be altered by the circumstance, that the fact which the judge is to decide, as a condition precedent, is the same fact that is to be decided by a jury on the issue: as where the declarations of an agent are admissible, he may first prove to the satisfaction of the judge that he is an agent, and his evidence therefore is admissible, though the question at issue turns upon the fact whether he be an agent or not, and the jury have ultimately to decide that question."—1 Phil. Ev. 6-7. If, on the hearing of the preliminary testimony as to such entries, the judge decides in favor of their admission, they should go to the jury as evidence, "unless the defendant, in open court, deny upon oath their truth;" in which event, they, or such of them as are thus denied, are no evidence, and cannot go to the jury at all.

Accompanied with proof of hand-writing, the books of original entries of a physician would, in most, if not in all cases, bear intrinsic evidence upon their pages of their true character. In New Jersey, such and similar books are sufficiently identified, by proving that they are in the party's hand-writing.—*Shute v. Ogden*, 2 Pennington, 921. And such we hold, would be, *prima facie*, sufficient proof of identity.

3. Every contract in this State, the consideration of which is founded upon services rendered as a physician, is void, unless the person rendering such services has obtained a license to practice in such capacity, either from one of the medical boards of this State, or at some medical college in

the United States; and a diploma from any such college is evidence of his authority to practice medicine and surgery. Code, § 977; Acts, 1859-'60, p. 20.

A proper construction of the said act of 1859-'60 forbids the conclusion, that before the physician can derive benefit from his diploma, he must prove the incorporation, or regular establishment and organization, of the medical college awarding it. A diploma is an instrument, usually under seal, "conferring some privilege, honor, or authority; now almost wholly restricted to certificates of degrees conferred by universities and colleges."—Worcester's Dictionary. Such an instrument, generally, if not universally, on parchment, is not easily fabricated; and we think it was the intention of the legislature that a diploma, when produced, should be received without further testimony in regard to it, as *prima facie* "legal evidence of the authority of the physician to practice medicine and surgery." The act of 1859-'60, being remedial in its character, must receive a liberal interpretation, in furtherance of the object intended to be accomplished by it.

4. The loss of the original having been shown, the plaintiff produced the next best evidence of it in his power; which was testimony that a diploma had been awarded and delivered to him, by a medical college in the United States. The deposition containing this evidence was properly admitted to the jury, with the exception of that portion in which the witness stated the contents of an order appearing on the records of the college. An examined copy would have been the highest and best evidence of this order. It may be, however, that the testimony relating exclusively to the order was superfluous or redundant, the case of the plaintiff as to the diploma having been fully made out by the other testimony of the witness; and that, consequently, its admission was error without injury. Shepherd's Digest, 568, § 90; *Jemison v. Smith*, 37 Ala. 185; *Bishop v. Blair*, 36 Ala. 80. But whether this rule can be properly applied under the facts of this case, we will not determine, inasmuch as the judgment must be reversed for the error before noticed, and the point will probably not arise again on another trial.

Let the judgment be reversed, and the cause remanded.

BOON & Co. vs. STEAMBOAT BELFAST.

[LIBEL IN ADMIRALTY AGAINST STEAMBOAT.]

1. *Liability of common carrier for loss by robbery; admissibility of custom.*

The owners of a steamboat are liable, as common carriers, for a loss of goods by robbery; and where the only exception specified in the bill of lading is "dangers of the river", parol evidence cannot be received to show a custom among the persons who were engaged in navigating the river, which exempted the owners of the boat from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew. (Overruling *Steele v. McTyer's Adm'r*, 31 Ala. 667.)

APPEAL from the City Court of Mobile.

Tried before the Hon. H. CHAMBERLAIN.

THE appellants in this case filed a libel in admiralty, on the 30th March, 1866, against the steamboat *Belfast*, claiming fifty-eight hundred dollars, the alleged value of twenty-nine bales of cotton, which, with other bales, were shipped on said boat at Columbus, Mississippi, to be transported to Mobile, and were never delivered to the consignees. B. C. Nelson and A. F. Hurtel intervened as owners of the boat, and filed an answer to the libel, alleging that the boat, while moving down the river, was forcibly boarded and seized by a body of armed men, without fault on the part of the officers or crew, and the cotton thereby lost; and that they were not liable for the loss under these circumstances, by virtue of a custom or usage among the persons who were engaged in navigating the river. The material portions of the answer are copied in the opinion of the court, and need not be here repeated. The libellants excepted to the allegations of the answer as to the custom, on the ground that such custom, if it existed, was illegal and void. The city court overruled the exception, and, on the trial, admitted parol proof of the custom, against the objections of the libellants; and these rulings of the court are now assigned as error.

DARGAN & TAYLOR, for appellants.—1. Nothing will excuse a common carrier from liability for the loss of goods, except the act of God or of the public enemy. This rule is founded in a wise public policy, and is strictly enforced against carriers.—2 Kent's Com. 597; Story on Bailments, 492, 495; 1 Parsons on Contracts, 635, 638–9; 5 Story's R.

2. The alleged custom, if its existence were proved, could not be allowed to change the express contract of the parties. Some of the cases, in upholding the validity of particular customs or usages, have already gone further than sound policy justified; and they ought not to be extended. A custom which would open a door for fraud and collusion, injuriously affect public morals, and be disastrous to commercial interests, cannot be sanctioned.—23 How. 49, 63; 2 Sumner, 567; 1 Sandf. S. C. R. 137; 2 Cr. & J. 243; 14 How. 445; 2 Kent, 556; 7 Yerger; 3 Phil. Ev. 1415; 19 Wendell, 251; 6 Pick 145.

W. BOYLES, *contra*, cited the following cases and authorities: *Sampson & Lindsay v. Gazzam*, 6 Porter, 123; *Steele v. McTyer's Adm'r*, 31 Ala. 667; *McClure v. Cox*, *Brainard & Co.*, 32 Ala. 617; *Renner v. Bank of Columbia*, 9 Wheat. 587; 40 Penn. St. 241; 43 Maine, 379; 1 Arnould on Insurance, 60, 66, 72, 74, 76; 4 Mees. & W. 211; 3 Day, 346; 4 M. & S. 150; 6 Har. & J. 408; *Fulton Insurance Co. v. Milner, Tinsley & Co.*, 23 Ala. 420; 7 Mass. 369; 2 Pick. 8; 7 Johns. 385; 7 Cowen, 202; 8 Wendell, 106; 4 Wendell, 33; 5 Barn. & Ald. 238; 7 Car. & P. 701; 4 N. & M. 602; 3 Barn. & Ald. 728.

JUDGE, J.—The respondents, in their answer to the libel, made the following averment in substance, as one of their grounds of defense: "That it is the universal practice and understanding, amongst all persons navigating the waters of the Tombigbee river, and of all persons shipping cotton to Mobile on said river, that where cotton is received on board of a steamboat, to be transported to Mobile, if the boat is captured by armed men, and the cotton thereby lost to the owner or owners, without any fault or neglect of the officers or crew of the boat, neither the boat nor the

owners of the boat are liable for said loss ; that the said practice and understanding is general, and universally known to all persons navigating said river to Mobile ; that is, that said custom is general, universal, and uniform, and known to all persons navigating said river, and all persons shipping cotton upon said river ; that said custom existed at the time of the contract of shipment, and before that time, and was known to all persons who were engaged in shipping cotton on said river to Mobile, and to all persons navigating said river."

This allegation was excepted to by the libellants, as setting up a custom in direct conflict with the law, and as being no bar to the libel. The court overruled the exception, and, on the trial, permitted parol evidence to be introduced by the respondents, to sustain the allegation, against the objection of the libellants.

The bill of lading was in the usual form. It acknowledged the receipt of a certain number of bales of cotton at Vienna, to be delivered at Mobile, "dangers of the river excepted." As to this cotton, the boat and its owners became answerable for accidents and thefts, and even for a loss by robbery. They became answerable for all losses which do not fall within the excepted cases of the act of God and public enemies. This, as Chancellor Kent remarks in his Commentaries, "has been the settled law of England for ages ; and the rule is intended as a guard against fraud and collusion, and it is founded on the same broad principles of public policy and convenience which govern the case of inn-keepers."—2 Kent, 598.

"The only exception expressed in the contract in this case is, 'dangers of the river.' The only exceptions implied by law, are, the act of God, or of the public enemies." *Cox, Brainard & Co. v. Peterson*, 30 Ala. 608.

Whilst in all contracts, "as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages"; and whilst "parol evidence of custom and usage is always admissible to enable us to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage"; yet, "it is not admitted

to contradict, or substantially to vary, the legal import of a written agreement. The usage of no class of men can be sustained in opposition to the established principles of law." Addison on Contracts, 853; *Price v. White*, 9 Ala. 563; *McClure & Co. v. Cox, Brainard & Co.*, 32 Ala. 617.

The true and appropriate office of a usage or custom, is correctly stated by Judge Story, in the case of the *Schooner Reeside*, 2 Sumner, 567. In that case, it was attempted to vary the common bill of lading, by which goods were to be delivered in good order and condition, "*the danger of the seas only excepted*," by establishing a custom that the owners of packet vessels between New York and Boston should be liable only for damages to goods occasioned by their own neglect. In delivering the opinion of the court, Judge Story said: "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may be also admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible, to supersede, or vary, or control a custom or usage; for the latter may always be waived at the will of the parties. But a written and express contract can not be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties."—See, also, 2 Parsons on Contracts, note on

page 59, and authorities there cited; *Howe & Bokee v. The Mutual Ins. Co.*, 1 Sanford's Sup. Court Rep. 137.

"It may be difficult to draw the precise line of distinction, between cases in which evidence of usage and custom ought to be admitted, and cases in which it ought not to be admitted." Upon this question, "much confusion and inaccuracy have crept into the adjudged cases, so that any attempt to reconcile them would necessarily prove abortive."—*McClure & Co. v. Cox, Brainard & Co.*, *supra*; *Barlow v. Lambert*, 28 Ala. 704. But we think it clearly settled by the decided weight of authority, that a general usage, the effect of which is to control rules of law, is inadmissible; and that the clear and explicit language of a contract cannot be enlarged or restricted by proof of a custom or usage.

The decisions of this court upon the question have generally been in accordance with this view.—*Andrews v. Roach & Caffey*, 3 Ala. 590; *Price v. White*, 9 Ala. 563; *West, Oliver & Co. v. Ball & Crommelin*, 12 Ala. 340; *Ivey v. Phifer*, 13 Ala. 821; *Petty v. Gayle*, 25 Ala. 472; *Barlow v. Lambert*, 28 Ala. 704; *Ala. & Tenn. Rivers R. Road Co. v. Kidd*, 29 Ala. 221; *Smith & Holt v. Nav. Ins. Co.*, 30 Ala. 167; *Cox, Brainard & Co. v. Peterson*, 30 Ala. 608; *McClure & Co. v. Cox, Brainard & Co.*, 32 Ala. 617; *Jones v. Fort*, 36 Ala. 422.

The decision in *Steele v. McTyler's Adm'r*, (31 Ala. 677,) lays down a contrary principle; and so much of that decision as holds that parol evidence is admissible, to show that by a custom existing on a particular river, flat-boatmen were not responsible for a loss caused by dangers of the river, although the bill of lading contained no such exception, being in opposition to the principle announced in this opinion on that question, is overruled.

In *Sampson & Lindsay v. Gazzam*, (6 Porter, 123,) it was held to be permissible for the owner of a steamboat, when sued for the loss of goods by fire, to show by parol that the exceptive words, "dangers of the river," in a bill of lading, by custom and usage include dangers by fire. This decision has been so often recognized and followed by this court, in cases involving the *identical* question, that the

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principle established by it must now be regarded as the settled law of the State, in its application only to cases of the particular class to which it specially relates; we are unwilling to extend its application beyond this limit.—See *Hibler v. McCartney*, 31 Ala. 501.

The rule which makes the common carrier in the nature of an insurer, and answerable for every loss not attributable to the act of God or public enemies, according to Lord Holt, “was a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliged them to trust those sorts of persons;” “it was introduced to prevent the necessity of going into circumstances impossible to be unravelled.” “If it were not for such a rule, *the common carrier might contrive, by means not to be detected, to be robbed of his goods in order to share the spoil.*”—2 Kent, 603.

The same public policy which established this rule, and which has continued it in existence for ages, forbids its destruction at this day in any locality, by any pretended custom; especially when the business of common carriers has so much increased, and the necessity for the rule, instead of being diminished, is also increased. The custom, then, sought to be established in this case, is contrary to law, in contravention of a sound public policy, and can not receive our sanction.

It follows that the court below erred in overruling the designated exception to the answer of respondents, and in admitting parol evidence to establish the custom relied on; and its decree must be reversed, and the cause be remanded.

CLEMENS vs. WALKER & BRICKELL.

[APPLICATION FOR REVOCATION OF LETTERS OF ADMINISTRATION.]

1. *When appeal lies.*—Under the act approved December 12, 1857, entitled “An act to regulate appeals from probate courts,” (Session Acts,

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1857-8, p. 244,) an appeal lies from an order or decree of the probate court, refusing and dismissing an application for the revocation of letters of administration.

2. *Administration de bonis non* ; *presumption in favor of judgment*.—On application for the revocation of letters of administration, which are averred in the petition to be “letters of special administration,” but which are nowhere set out in the record, the appellate court will presume, in order to sustain the ruling of the probate court, that they were letters of administration *de bonis non*, if the facts stated in the petition only authorized the grant of such letters.
3. *Administration pendente lite*.—If, after the death of a general administrator, who has not fully administered the estate, a contest should arise between persons claiming the right to administer, the probate court has power (Code, § 1676) to appoint an administrator *pendente lite*; but such special administration, *it seems*, should not continue longer than the necessity of the case requires, and should not be allowed to delay or injure the rights of creditors, legatées, or distributees; and if a contest should arise respecting the validity of the decedent's will, which has been admitted to probate, such administrator would not be a proper party to the litigation, but an administrator *de bonis non* should be appointed.

APPEAL from the Probate Court of Madison.

IN the matter of the estate of James Clemens, deceased, on the application of James L. Clemens for the revocation of letters of administration previously granted by said court to L. P. Walker and R. C. Brickell. The petition was filed on the 3d March, 1866, and was under oath. Its allegations were in the following words :

“1st, That James Clemens, who was at the time of his death an inhabitant of said county, died, testate, on the — day of —, 1860 ; that his will was probated in said court, on the — day of —, 1861 ; that the executors had (?) therein renounced the executorship thereof, and letters of administration with said will annexed on the estate of said testator were, on the — day of —, 1861, granted to Benjamin Patterson, who gave bond, and qualified as such administrator in said court ; that said Benjamin Patterson died on the — day of —, 1863, without having made a final settlement of said estate ; and that since the death of said Benjamin Patterson, there has been a continued vacancy in the general administration of said estate. 2d, That on the 28th day of October, 1865, letters of special administration

on the estate of said testator were granted by said court to Leroy P. Walker and Robert C. Brickell. 3d, That said grant of letters of special administration by this court to said Walker & Brickell was improper, because general letters of administration with the will annexed on said estate had duly issued to said Benjamin Patterson previously. 4th, That said Leroy P. Walker and Robert C. Brickell were not suitable persons to be appointed administrators of said estate, because said Robert C. Brickell is one of the sureties of said Benjamin Patterson, on his bond for the administration of the estate of said testator, and also the administrator of the estate of Egbert J. Jones, deceased, who was another surety on the said bond; and there has been no settlement of said Patterson's administration of said testator's estate, and said Patterson's estate is believed to be insolvent; and also because said Robert C. Brickell is one of the sureties of George W. Drake, who was special administrator of said estate of said testator previous to said Patterson's appointment, on his bond for the special administration of the estate of said testator, and said Drake's special administration of said estate has never been settled. 5th, That more than two months have elapsed since the grant of letters of special administration to said Walker & Brickell, and they have failed to make and return to said court an inventory of the property of said estate. 6th, That said Walker & Brickell have rented the lands of said estate, and sold personal property thereof, more than sixty days since, and failed to report such renting and such sale to this court. 7th, That said Walker & Brickell have sought to prevent the vacancy in the general administration of the estate of said testator from being filled by the appointment of administrators *de bonis non*, with the will annexed, to the injury of the heirs-at-law, or legatees under the will, the debtors and creditors of the estate. 8th, That said Walker & Brickell have instituted no proceedings to effect a settlement of the administrations of said Drake and said Patterson. 9th, That said Walker & Brickell have committed other acts of maladministration of said estate. 10th, That said petitioner is an heir-at-law of said testator, being one of the children of Archibald M.

Clemens, who was a son of said testator, and died in his life-time, and also a legatee under said will of said testator."

The following "specifications" were afterwards added, "by leave of the court and consent of the parties," to the 9th allegation of the petition :

"1st, That on the 18th December, 1865, they rented the Millbrook plantation of said estate to your petitioner, at public outcry, for the sum of twenty-five hundred and twenty dollars, and refused to comply with their contract of renting to your petitioner, and rented the same to Major Goodfellow, for one hundred and twenty dollars less, without any default or acquiescence on the part of your petitioner. 2d, That said Robert C. Brickell refused to endorse your petitioner's statement of the facts to General Grierson, to whom he had applied for relief against said Goodfellow, excusing himself on the ground that, one John D. Turner, who was interested with your petitioner in said renting, gave up the contract, and consented that the plantation should be rented; which statement of Robert C. Brickell was untrue. 3d, That Robert C. Brickell, in a conversation with F. P. Ward and others, spoke of the payment out of the estate of their fee for professional services in the probate proceedings that resulted in the probate of the will of said testator, now of probate, as one of the conditions (there being other contingencies) on which the special administrators would withdraw their opposition to having the estate committed to administration *de bonis non*, with the will annexed."

The defendants answered the petition, and incorporated in their answer a demurrer to the petition; assigning as grounds of demurrer, "that said petition shows no sufficient cause for their removal; and to the first, second, and third specifications of the 9th allegation, that no one of said specifications shows maladministration." The bill of exceptions, and the judgment-entry, each, states that "the defendants demurred to all the allegations of the plaintiff's petition, except those contained in paragraphs numbered 5 and 6, and the first specification under paragraph No. 9"; that "the plaintiff objected to the defendants being allowed to

demur to a part only of the petition"; that the court nevertheless heard and sustained the demurrer; and that the plaintiff excepted to this ruling and decision. The judgment-entry further states, that "the plaintiff then amended his petition, by striking out the allegations in paragraphs Nos. 5 and 6, and the issue as to maladministration on the first specification under allegations in paragraph No. 9 was submitted to the jury; and the jury having found their verdict in favor of the defendants, it is ordered, adjudged, and decreed by the court, that the application be now here refused and dismissed, and that the costs of this proceeding be taxed against the plaintiff, and that said petition and answers be recorded and filed."

"The final decree of the probate court, and the rulings to which exceptions were reserved," are now assigned as error.

A motion to dismiss the appeal was submitted on the part of the appellees.

GEO. W. STONE, with whom was J. W. SHEPHERD, for appellant.—1 The decision of the court in this case is a final decree, (Session Acts, 1857–8, p. 244,) and an appeal lies therefrom. Such an appeal has been entertained by this court in *Curtis v. Williams*, 33 Ala. 570, and in *Curtis v. Burt*, 34 Ala. 729.

2. The special administration for which the Code makes provision, is, under our statutes, one of such limited powers, that, in the absence of express legislative authority, we ought not to hold that such trust can be created after an estate has once passed into the hands of an administrator in chief.—Code, § 1677. Such special administrator can collect the goods and chattels of the estate, and *debts of the deceased*. This authorizes him to reduce to possession the goods and chattels which remain in specie; but he can not bring the administrator in chief, or his representative, to a settlement. He can collect debts of the *deceased*, but not debts created in the purchase of property belonging to the estate. He can thus possess himself of only a part of the property, and must leave the balance unrepresented, and uncared for. A special administrator, appointed before

the appointment of an administrator in chief, can perform fully and completely all the functions and duties which the law casts on him. He can not, in a majority of cases, perform half the functions which the law imposes on him, if he be appointed immediately after an administration in chief. The very great danger to which estates will be left exposed, if the rule be established that special administrators may be appointed after administration in chief, should incline the court against such rule, even if the statutes leave the question in doubt.

3. But the sections of the Code repel such construction. Section 1676 shows the purpose for which such special administrator is appointed; "the collection and preservation of the goods of the deceased, until letters testamentary or of administration have duly issued." In the present case, letters of administration "have duly issued" to Benjamin Patterson. The event has thus happened, which terminates the powers of the special administrator; and the event happened long before they were appointed. We have thus the anomaly of an administrator appointed, every one of whose functions had become impossible of performance long before his appointment.

Section 1677 of the Code means nothing, unless the special administrator has power to possess himself of all the assets of the estate. The very object of his appointment is the preservation of the estate. It is shown above, that if appointed after administration in chief, he can not possess himself of the whole assets of the estate. Section 1678 authorizes the special administrator to sell goods that are "perishable and wasting." Section 1679 shows that the powers of the special administrator cease, when letters testamentary or of administration issue. Section 1682, like all the other sections above commented on, and section 1694, all tend to show that special administration must always precede, and never can succeed, administration in chief. When it precedes, the duties cast on him may all be performed by him. When it comes after administration in chief, there will always be confusion, and an imperfect conservation of the assets.

4. The absence of all authorities, English and American,

authorizing such appointment, goes very far to show the authority does not exist. Let it be borne in mind, that in this case, there is a probated will, and not even proceedings set on foot to revoke the probate. The court had power to appoint an administrator *de bonis non*, and if no suitable person applied for the appointment, it was the duty of the court to commit the administration to the general administrator, or to the sheriff.—Code, §§ 1680-1.

5. In England, the rule seems to be, to have a receiver appointed by the chancery court, whenever, by subsequent litigation, the safe keeping of the assets may render such appointment necessary. The power of the court of chancery to graduate the relief, and to attemper the powers of the receiver to the wants of the particular case, is too manifest to render necessary any argument in favor of that practice, when compared with the course pursued by the probate court in this case. See *1 Lomax Executors*, 305-6; *1 Wms. Ex.* 409-10-11; *Jones v. Goodrich*, 10 Sim. 327; *Rutherford v. Douglas*, 1 Sim. & Stu. 111; *Ball v. Oliver*, 2 Ves. & B. 96. See, also, *Rendal v. Rendal*, 1 Harr. 152.

6. The elementary authors, and the adjudged cases, all tend to show that special administration precedes administration in chief.—See authorities collected in *Erwin v. Br. Bank*, 14 Ala. 310.

7. The case of *Slade v. Washburn*, (3 Ired. Law, 557,) is not opposed to our view. In that case, there was no will of record, or probated, at the time the administrator was appointed. True, there had been an imperfect compromise and an informal administration; but the inference from the report of the case is, that nothing had been done under the administration. Speaking of the very will then propounded for probate, Judge Gaston said, "We must understand that the courts had revoked the previous probate of the supposed will, and that the paper which had been propounded as such remained before it, to be established or rejected according to the determination of that issue." There had, in fact, been no administration; for under the agreement, Mrs. Priscilla Washburn was to remain in possession during her life, and then the property was to be divided in a particular way.

Judge Gaston cites no authority in support of his statement, that the appointment was void, and none can be found to support it. It is at war with the principles settled in *Bradley v. Broughton*, (34 Ala.) and with the modern decisions generally. The English doctrine of a receiver has the qualification, that if there be a contest as to two wills, and one has been probated, the chancery court will not interfere, nor appoint a receiver, except for special reasons.—See *Rendal v. Rendal*, *supra*.

GOLDTHWAITE, RICE & SEMPLE, *contra*.—There is no such final judgment or decree in the case as will authorize an appeal; and there is no law which gives an appeal from a mere refusal to revoke special letters of administration, where no statutory disqualification or cause of removal is alleged and proved.—*Brennan v. Harris*, 20 Ala. 185; *White v. Shannon*, 3 Ala. 286; *Pratt v. Kittrell*, 4 Dev. 168; Sess. Acts, 1850, p. 33, § 29.

2. Every person is fit to be an administrator, unless disqualified by some one of the specified statutory causes. *Williams v. McConico*, 27 Ala. 572; *Walker v. Torrance*, 12 Geo. 106; *Brown v. Strickland*, 28 Geo. 387; *Torrance v. McDougald*, 12 Georgia, 526; *Percy v. De Wolfe*, 2 Rhode Island, 103.

3. Whenever there is no qualified executor or administrator, the probate court has jurisdiction to appoint a *special* administrator, in every case “in which it is necessary”; and it necessarily has jurisdiction to decide whether such necessity exists.—Code, § 1676; *Flora v. Mennice*, 12 Ala. 836; *Robinson v. Robinson*, 11 Ala.; *Brittain v. Kinnard*, 1 Brod. & Bing. 432; *Pratt v. Kittrell*, 4 Dev. 168; *Ikelheimer v. Chapman*, 32 Ala. 692; *Martin v. Mott*, 12 Wheaton, 19; 9 Cowen, 88; *Moseley v. Mastin*, 37 Ala. 216. But it has no jurisdiction to grant general letters, pending a contest as to the probate of the decedent’s will.—*Slade v. Washburn*, 3 Ired. Law, 557; *Erwin v. Br. Bank*, 14 Ala. 310.

4. The question of the power of the court to appoint special administrators is not raised in this case. The petition does not aver that there was no necessity for such appointment. The order itself not being set out, it will be

presumed, in the absence of proof and averments to the contrary, to have been supported by the necessary facts.— Authorities above cited.

5. The appellant is precluded from saying that the grant of letters to the appellee is void, because his petition asks their removal, and the revocation of their letters. There is a material difference between a grant of letters which is absolutely void, and one which is merely voidable.—*Hyman v. Gaskins*, 5 Ired. L. 267; *Springs v. Erwin*, 6 Ired. L. 27.

BYRD, J.—The appellees move to dismiss the appeal, on the ground that the law does not authorize an appeal in such proceeding, and from such an order, as this record shows. The motion must be overruled, under the provisions of the act approved December 12th, 1857, (Pamph. Acts, p. 244,) and upon the authority of the cases of *Curtis v. Williams*, 33 Ala. 571, and *Curtis v. Burt*, 34 Ala. 729. These cases are almost identical with this one, as respects the question of appeal. It is true, the question was not made in those cases; but, as this court took jurisdiction, they must be taken as conclusive as to the proper construction of the act of 1857.

2. This was a proceeding in the probate court, to revoke the letters of special administration granted by that court to appellees on the 28th day of October, 1865, for certain reasons set out in the petition filed and sworn to by appellant on the 2d day of April, 1866. The appellees, in their answer to the petition, interposed a demurrer thereto; but, upon the trial, the appellees seem to have limited their demurrer to all the allegations of the petition, except those contained in paragraphs No. 5 and 6, and the first specification under allegations in paragraph 9. The appellant objected to appellees being allowed to demur to only part of the petition; but the court overruled the objection, and the appellant excepted.—*Kirksey v. Fike*, 29 Ala. 206. The court sustained the demurrer, and the appellant excepted; and this is the only remaining question raised by the bill of exceptions and the argument of counsel. And the main question, and the only one of any merit, presented by the petition and demurrer, is, whether the probate court had

jurisdiction to grant special letters of administration to appellees, after the probate of the will of the testator, and grant of letters of administration with the will annexed, and the termination of the administration in chief by the death of the administrator.

The petition does not show what was the character or kind of special administration granted or conferred by the letters issued to appellees by the probate court; and in the absence of any averment, we are left to conjecture; and, in order to sustain the ruling of the court below, must presume that the court granted such an one as it was competent to grant. Bouvier says, administrators are *general* or *special*: *general* are of two kinds; "*first*, when the grant of administration is unlimited, and the administrator is required to administer the whole estate under the intestate laws; *secondly*, when the grant is made with the annexation of the will, which is the guide to the administrator to administer and distribute the estate." Special administrators are of two kinds: "*first*, when the administration is limited to part of the estate; as, for example, when the former administrator had died, leaving a part of the estate unadministered, an administrator is appointed to administer the remainder, and he is called the administrator *de bonis non*. He has all the powers of a common administrator. When an executor dies, leaving a part of the estate unadministered, the administrator appointed to complete the execution of the will is called an administrator *de bonis non cum testamento annexo*. *Secondly*, when the authority of the administrator is limited as to time;" as, administrators *durante minore etate*, *durante absentia*, and *pendente lite*.

Upon the death of the general administrator, the court had the power to appoint a special administrator *de bonis non, cum testamento annexo*; and how are we to determine that the appellees are not so appointed, from the allegations of the petition? The words "special administration," used therein, do not negative the presumption that they were so appointed. They are altogether consistent therewith. The language of the 7th allegation does not clearly negative such a presumption. But, supposing it does, then what kind of "special administration" was granted appellees,

and for what reason was it granted? The petition does not affirm the existence of the facts which would have authorized the appointment of an administrator *pendente lite*. But the probate court being one of general jurisdiction, this court, on such a petition as this, will presume that the court below had sufficient proof to authorize it to grant special administration to the appellees.—1 Pet. Abr. 253; *Price v. Parker*, 1 Lev. 157; *Ikelheimer v. Chapman*, 32 Ala. 680; *Moseley's Adm'r v. Mastin*, 37 Ala. 216; *Sims v. Boynton*, 32 Ala. 553; *Bradley v. Broughton*, 34 Ala. 705. •

3. If, after the death of a general administrator, who has not fully administered the estate, there should be a contest between persons claiming the right to administer upon the unadministered assets, the court has the power to appoint an administrator *pendente lite*.—*Walker v. Dougherty*, 14 Geo. 653; *Dean v. Biggers*, 27 Geo. 74; *Slade v. Washburn*, 3 Iredell's Law, 560; *Springs v. Erwin*, 6 Iredell's Law, 27; *Pratt v. Kittrell*, 4 Dev. Law. 171; *Ball v. Oliver*, 2 Ves. & Bea. 96; *Goods of John Morgan*, 9 Eng. Law & Eq. 581; *Jordan v. Polk*, 1 Sneed, 432; *I Lomax Ex'rs*, 305; *Watson v. Bothwell*, 11 Ala. 654; *Robinson v. Robinson*, 11 Ala. 952.

The case cited from 14 Geo. R. loses something of its weight, by the manner in which the learned court aids the "oversight of the counsel" and the bill of exceptions; yet, it decides upon a statute not clearer or more comprehensive than section 1676 of the Code, a question almost identical with the one involved in the decision of this cause, except that, in the Georgia case, the doctrine of presumptions is carried much farther than we are willing to go in order to aid a bill of exceptions or the ruling of the court below.

Section 1676 confers on the probate court the power, in certain cases, "or in any other case in which it is necessary", to appoint "a special administrator." This seems to be clear and explicit; and the cases cited from 11 Ala. R. very suggestively indicate that this power is sufficient to meet every contingency that may arise in the course of the administration of an estate, and so as to avoid the necessity of seeking the assistance of a court of chancery in many cases, where, heretofore, the probate court was inade-

quate, on account of its want of power to appoint a special administrator, to preserve and protect the estate from waste.

These special administrations, "limited as to time," should not continue a moment longer than the necessity exists which brought them into being; and the probate court should see to it, that they are not used to the delay and injury of creditors, to unnecessarily increase the costs of administration, or as impediments to legatees and distributees obtaining their just rights.

In this case, if the appellees are not administrators *de bonis non* with the will annexed, it would seem that it would be to the interest of the creditors of the estate, if any, and to the proper conducting of the litigation pending as to the validity of the will of James Clemens, deceased, now on record, and its probate, that there should be such appointed immediately. Administrators *pendente lite* are not proper parties to such litigation; and after the probate of a will, and its admission to record, it would seem more in conformity to principle that some one who represented the legal title conferred by the will to the property should be made a party to the litigation. These remarks are based upon the defense set up in the first paragraph of the answer of the appellee, and with a view to preparing the way to a termination of the protracted litigation which is involving this estate in heavy costs, and the legatees and distributees, if not also creditors, in an almost helpless pursuit of their just dues and rights.

In the case of *Slade v. Washburne*, *supra*, Judge Gaston, in delivering the opinion of the court, makes some very pertinent and forcible remarks, as to the difficulty courts have frequently to encounter, in the interpretation of the entries and records of these courts of probate, which exercise so important a jurisdiction in our country. The record neither shows that there was any necessity for such grant of letters of special administration, *limited as to time*, to appellees, nor that there was no necessity for such grant. The court had no power to make an appointment of a special administrator after the probate of a will and a grant of letters of administration with the will annexed, unless there

was some necessity shown therefor; and in some cases this necessity should be shown by the record, otherwise the grant *might* be voidable, if not void. But, however this may be, the petition in this case failing to set out the order of the appointment of appellees, we must presume that the record is unassailable.

The case of *Clemens v. Wilson*, from the circuit court of Madison county, was submitted with this case, and argued on the same brief by appellants' counsel; and some of the remarks of this opinion are more applicable to that case than this, and will shorten the opinion in that case; but the record in that cannot supply the defects of this, if any. Both cases arise from litigation in the administration of the estate of James Clemens, deceased. The case of *Walker v. Dougherty*, *supra*, might seem to warrant us in looking at both records, in such a case, to aid us in coming to a conclusion upon each case; but this we cannot do.

The judgment of the probate court must be affirmed.

NOTE BY REPORTER.—The appellant's counsel filed a petition for rehearing, and submitted with it the annexed brief; in response to which application, the following opinion was afterwards delivered.

GEO. W. STONE, and J. W. SHEPHERD, for the appellant. The assertion of Bouvier, that an administrator *de bonis non* is a special administrator, on the authority of which the opinion of the court is mainly rested, is supported by citing Bacon's Abr., Swinburn, Rolle's Abr., and 6 Sm. & Mar. These elementary writers simply state the principle as Bouvier states it. The case in 6 Sm. & Mar. merely decides, that the powers of an administrator *de bonis non* do not extend to the assets previously administered by the administrator in chief. The precise question was, whether an administrator *de bonis non* could recover from an administrator in chief, a balance found in his hands at the cessation of his authority. It was ruled that he could not. That was correct. The same rule obtained in this State, before our statute enlarged the powers of an administrator *de bonis non*, and authorized him to recover from his prede-

cessor the assets received by him, and not accounted for. Sess. Acts 1857-8, page 58.

Now, in what sense did Bouvier, and the other elementary authorities, employ the word *special*? Special, that is, *limited*, in this, there was one class of assets (those reduced or converted by the previous administrator) over which he had no control. His powers, being limited, could not be called general; limited, however, not in the character of his functions, or the nature of his powers over the assets, but as to the subjects over which his authority extended; a limit of area, not of prerogative. He had the same power and discretion *over*, and property *in* the *assets of the estate*, as his predecessor had. He could not preserve assets converted by the administrator in chief. These had ceased to be assets of the estate, by the *devastavit* of the administrator in chief. There is not one word in the Code, under the clauses which relate to special administrations, which does not show that such administrations are limited *as to the character of the powers* exercised; a limit of prerogative, not of area. What is meant by special, or limited administrations in this State, and under our statutes, is shown in the case of *Flora v. Mennice*, 12 Ala. 836.

In the order appointing Messrs. Walker & Brickell, the probate judge employs many of the *very words* which our statutes employ in defining the powers of a special administrator. Does this mean nothing? Can it be supposed that the probate court was guilty of the supreme absurdity of specifying certain conferred powers, when it was intended and understood that other and larger powers were thereby imparted? Why be so specific, when a general appointment of administrator of the goods and effects of testator, left unadministered by the administrator in chief, would not only have conformed to the usual rule, but would have been at once precise and brief?

But the practice has become general, if not universal, with good pleaders and clerks, of copying the language of the statute, whenever the aim is to pursue a statutory remedy. Such is the case in indictments, probate proceedings, and in all summary jurisdictions; and these quotations from the statute are the only evidence on which the court

acts, in determining under what statute the proceeding is had. The courts have always acted on such evidence, and, without the observance of such rule, the court must grope in uncertainty and doubt, whenever such proceedings come up. Now, when a case comes up which, by quotations, shows *the statute* under which the pleader is proceeding, is it safe to regard such quotations as surplusage, and hold that the proceeding is under a different statute, to which no reference whatever is made?

But, since the passage of the statute of 1857-8, referred to above, an administrator *de bonis non* is not properly a functionary of limited powers. It is his province and duty, not only to possess himself of all effects remaining in specie, but to bring his predecessor to a settlement, and recover from him, or his representative, all assets not previously disbursed in proper administration. How, then, can he be called a special administrator? Special as to what? What character of assets is there, to which the powers of an administrator *de bonis non*, under our present statutory law, do not extend?

BYRD, J.—The court have carefully considered the reasoning and conclusion of the opinion heretofore delivered in this cause, and the arguments presented in the brief of the learned counsel for the appellants; and we are satisfied to adhere to the conclusion announced in that opinion.

Let the decree of the probate court be affirmed, at the costs of the appellant.

BULLARD AND WIFE *vs.* LAMBERT.

[SLANDER FOR WORDS IMPUTING WANT OF CHASTITY TO FEMALE.]

1. *General objection to evidence.*—An objection to evidence, a part of which is not obnoxious to the objection, may be overruled entirely.
2. *Objection to deposition on account of insufficient answers to cross-interrogatories.*—A deposition will not be suppressed on motion, on account of the failure of the witness to answer a cross-interrogatory in the appropriate place, when other portions of the deposition contain a substantial answer to the question; nor on account of the want of fullness of the answers, when they are substantially responsive and sufficient, and there is nothing in the deposition to justify the conclusion, that the witness was seeking to evade a disclosure of facts within his knowledge; nor on account of the failure to answer a question which is not pertinent to the issue; nor where the answer, if made, could not have affected the result of the case.
3. *Evidence in aggravation of damages; meaning of words as understood by hearers.*—In proving words which are not alleged in the complaint, and which can only be admissible in aggravation of damages, the plaintiff can not prove the sense in which such words were understood by the hearers, or “the impression made on their minds” by such words, unless the case falls within the principle stated in *Robinson v. Drummond*, 24 Ala. 174.
4. *Impeaching witness.*—When a witness testifies, on his direct examination, that he is acquainted with the character of another witness, and that he would not believe said witness on oath, it is permissible to show on cross-examination that he does not understand what is meant by character, and does not use the word in its proper legal signification.
5. *Admissibility of plaintiff's declarations, as tending to show want of chastity.*—The declarations of the female plaintiff, in an altercation between herself and her husband, in reference to her mother-in-law's statements concerning her unchaste conduct as reported and imputed to her by the alleged slanderous words, are competent evidence for the defendant, under the plea of justification, as bearing on the question of her chastity and modesty.
6. *Proof of character; cross-examination.*—Where a witness, who testifies that the character of the female plaintiff “is good,” states on cross-examination “that he never heard anything against her until some time after her marriage, *except what he heard took place between her and S.*” on a specified occasion, to which the defendant's evidence related, there is no error in refusing to exclude the italicized words.
7. *Impeaching witness on cross-examination.*—A witness can not be questioned, on cross-examination, about irrelevant matters affecting his

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general credit, for the purpose of contradicting and impeaching him; *secus*, as to matters which affect his credit in the particular case, as by showing hostility towards the party against him he is introduced.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. PORTER KING.

THIS action was brought by Joseph W. Bullard, and Martha R. Bullard, his wife, against Samuel Lambert, to recover damages for certain alleged slanderous words spoken by defendant concerning Mrs. Bullard, imputing to her a want of chastity. The defendant pleaded, "in short by consent," not guilty, justification, and the statute of limitations of one year; and issue was joined on all these pleas. Before entering on the trial, the plaintiffs moved the court to suppress the depositions of James and Nancy Cooper, on account of their failure to answer certain cross-interrogatories propounded to them on the part of the plaintiffs. The court overruled each of these objections, and the plaintiffs excepted.

On the trial, as the bill of exceptions further shows, the defendant offered in evidence the said depositions of James and Nancy Cooper, who were husband and wife, and who testified to the commission of an act of adultery by Mrs. Bullard and one Samuel Spigner, on a specified occasion when they slept at the house of said witnesses. "The plaintiffs moved the court to exclude from the jury those parts of said depositions which related to what happened between Mrs. Bullard and said Spigner at the house of said witnesses, on the ground that the same was irrelevant." The court overruled the objection, and admitted the evidence; and the plaintiffs excepted.

The plaintiffs introduced one Kennedy as a witness, "who testified that, in February, 1857, the defendant told him that he saw one Ross pass his house one evening, in the direction of Bullard's house; that he did not think the signs were right, and so followed him; that said Ross went to Bullard's spring, where Mrs. Bullard was washing; that he crept close to them, and secreted himself in a thicket, where he overheard their conversation, and witnessed their conduct; and that from the way things went on between them,

she would not do. Plaintiffs asked the witness what he understood the defendant to mean by that language; and the witness answered, that the impression made on him by the language was, that '*Ross and Mrs. Bullard were too thick*.' The court excluded this answer from the jury, on motion of the defendant, and the plaintiffs excepted.

The defendant had taken the depositions of Samuel Bailey and John Works, for the purpose of impeaching the character of Hosea Lecroy, a witness for plaintiffs; each of whom testified, in answer to a direct interrogatory, that he was acquainted with the general character of said Lecroy, and, from that knowledge, would not believe him in a court of justice. The plaintiffs propounded the following cross-interrogatory to each of said witnesses: "What do you mean by general character? If you say that you would not believe Hosea Lecroy on oath, state why you would not." In reply to this interrogatory, said Works said, "I mean by his general character, that I am acquainted with his dealings with men; and the reason why I would not believe him on oath [is], I have known cases that caused me to form that opinion of him." The answer of said Bailey was, "What I mean by general character is, that his character is not good, and from a knowledge I have of his dealings with men; and the reason why I would not believe him on oath, because I have heard him say he would swear to things that I knew to be false." When said depositions were offered in evidence by the defendant, the plaintiffs "objected to the introduction of each separately, on the ground that it was not competent, as shown by the cross-interrogatories." The court overruled the objections, and admitted the evidence; to which the plaintiffs excepted.

The defendant offered in evidence the deposition of Mary Kelly. The plaintiffs had objected to the second direct interrogatory propounded to this witness, on the ground that it called for irrelevant and illegal evidence; and they moved to suppress the answer to said interrogatory, when offered in evidence, on the same grounds. The question and answer were in the following words: "Did you ever witness or hear a dispute between Joseph W. Bullard and Martha, his wife? If so, state all that passed between

them, as nearly as you can remember, and particularly all the charges that he made against her, and when it was. as nearly as you can remember." *Answer*: "I have heard a dispute between said Joseph W. and Martha Bullard. He cursed her, and she told him, if he did not shut his mouth, she would hit him with a rock. He told her, that he had heard her swear as hard as ever he did. She said, that he had heard her swear once about a lie his d——d old mother told on her and Samuel Spigner. This was in March, 1856." The court overruled the objections, and admitted the evidence; to which, also, the plaintiffs excepted.

The defendant introduced one Allen as a witness, to sustain the character of said James and Nancy Cooper; and on cross-examination by plaintiffs, said Allen testified, "that the character of Mrs. Martha Bullard was good." On re-examination by defendant, said witness stated, "that he had never heard anything against her until some time after her marriage, except what he heard took place between her and Samuel Spigner at James Cooper's, and he had heard that from James Cooper only." The plaintiffs moved to exclude from the jury "what he said about the occurrence at Cooper's," and reserved an exception to the overruling of their objection. The bill of exceptions states, in this connection, that "there was no evidence of any general report or rumor in the neighborhood, of any occurrence between Mrs. Bullard and said Spigner, at James Cooper's; nor did the defendant, on the motion to exclude said evidence, announce that he expected to prove any such general rumor or report."

"The defendant, on cross-examination of one Richards, plaintiffs' witness, asked if he did not tell one Benjamin Newman, at Ross' mill, in the spring of 1857, 'that he did not care a d—n about Bullard, but he intended to run Lambert out of the country; that Lambert had a piece of land he wanted, and he would have got it if it had not been for Lambert.' " The bill of exceptions does not set out the answer of the witness, nor does it state that the answer was objected to. The defendant introduced said Newman, and asked him about the conversation referred to; and the witness stated that, at the time and place designated, such

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declarations were made to him by said Richards. The plaintiffs objected to the question propounded to said Newman, "as tending to elicit incompetent and irrelevant testimony," and excepted to the overruling of their objection.

All the overrulings of the court on questions of evidence, to which exceptions were reserved, are now assigned as error.

W. P. CHILTON, and JNO. A. ELMORE, for appellants.

THOS. H. WATTS, L. E. PARSONS, and JNO. T. MORGAN, *contra*.

A. J. WALKER, C. J.—Twenty-four several objections were made by the appellants to the deposition of James Cooper, and nine to the deposition of Nancy Cooper. Each one of these thirty-three objections alleged a failure to answer some cross-interrogatory, and was presented as a reason for the suppression of the deposition, before the commencement of the trial. I decide that there was no reversible error in the overruling of each one of these many objections. It would avail no useful purpose to give with particularity the reasons for my decision in reference to each objection; and in doing so, I should make this an extremely voluminous opinion. I shall, therefore, content myself with stating, in a general way, the reasons which a careful examination of the separate objections has brought to my view, for sustaining the court below in its rulings.

1-2. Some of the objections are not well taken in point of fact. Some of them, if true to any extent, are not true to the extent alleged; and it was not incumbent on the court to ascertain whether they were true in part.—*Wood v. Barker*, 37 Ala. 60; *Webb v. Kelly*, 37 Ala. 333; *Sterrett v. Kaster*, 37 Ala. 366; *Murphy v. State*, 37 Ala. 42. Some of the questions, said not to be answered, are not noticed in the appropriate place, but matter is found elsewhere in the deposition which responds to them; and this is sufficient to meet the objection.—*Harris v. Miller*, 30 Ala. 221; *Spence v. Mitchell*, 9 Ala. 744. Several of the answers, to which objections are made, are not so full as to defy extreme criticism, and are yet capable of standing the test of the doc-

trine announced in *Buckley v. Cunningham*, (34 Ala. 69,) in the following words: "The answers to the cross-interrogatories are certainly not chargeable with redundancy; but, upon a careful examination of them, it appears that all the questions receive a substantial answer; and as we can discover nothing which would justify us in concluding that the witness was seeking to evade the disclosure of facts within his knowledge, we think that the court committed no error in refusing to suppress his deposition.—*Spence v. Mitchell*, 9 Ala. 744; *Nelson v. Iverson*, 24 Ala. 9". A deposition should not be suppressed, when the question was not pertinent to the issue; nor when the answer could not have affected the result.—*Gibson v. Goldthwaite*, 7 Ala. 281; *Yarborough v. Moss*, 13 Ala. 176. Influenced by these several reasons and principles in reference to the imputed failures to answer, I approve the rulings of the court upon the motions to suppress the depositions.

3. The court excluded the evidence of the witness Kennedy, as to "the impression made on him" by certain words of the defendant. These words are not alleged in the complaint, and could have been admissible only in aggravation of damages. The principle upon which it is permissible to prove the sense in which words were understood, and the class of cases in which such evidence is admissible, are set forth in *Robinson v. Drummond*, 24 Ala. 174. The evidence here was not proper for the consideration of the jury, upon the authority of that case. It was more objectionable than the evidence rejected in *Smith v. Gafford*, 33 Ala. 168. See, also, *Kirksey v. Fike*, 29 Ala. 206. There is no reason why the "impression made on" a witness by a party's declaration should not be regarded in the same light in this case, as in cases generally. There was no error in the exclusion of the evidence.

The complaint charged the speaking of words imputing acts of lewdness generally to the plaintiff. The defendant pleaded justification; and the testimony of James Cooper and Nancy Cooper, which was objected to, tended to sustain the plea, and was therefore relevant, and properly admitted.

4. Two witnesses Works, and Bailey, examined by the

defendant, answered to the direct interrogatories that they were acquainted with the character of Lecroy, plaintiffs' witness, and that they would not credit his testimony. On cross-examination, they made admissions which tended strongly to show, that they did not understand what was meant by character, and did not speak of his character in reference to his repute among his acquaintances. This presented the common case of an assault in the cross-examination upon testimony drawn out upon the direct examination. The court very properly refused to exclude the evidence, and thus left its weight to the consideration of the jury.

The evidence of Richard Glover was admissible upon the same ground with that of James and Nancy Cooper, as above decided.

5. The altercation between Mr. and Mrs. Bullard, in which there was a statement of the character of her conversation when she was informed of something said by her mother-in-law concerning herself and Mr. Spigner, was properly permitted to go to the jury. Looking to the other evidence, I find there was ground for argument that her mother-in-law had been speaking of lewd conduct, to which the defendant's testimony under the plea of justification pointed. Her conduct and conversation, when informed of what was thus said upon that subject, was proper matter to be considered by the jury, in determining whether she was guilty. They might well inquire, in the light of such evidence, whether her conduct and conversation were such as would characterize a chaste and modest woman, conscious of innocence, and pained by an injury in the tenderest point.

6. There was no error in refusing to exclude the fragment of a sentence in the testimony of Allen, as the court was requested to do by the appellants. The exclusion would have materially changed the import and effect of what the witness did say. It would have left to the jury as evidence an unqualified statement, when in fact the witness only made the statement with an exception.

7. One of the plaintiffs' witnesses, Richards, was asked on cross-examination, whether he did not, to a named individual, and at a specified time and place, make a declaration

conducting to show hostility to the defendant in this particular case, and a wish to contribute to a result adverse to the defendant; not on account of any regard for the plaintiff, but on account of hostility to the defendant, and a desire to drive him out of the country. The witness having denied the making of such declarations, the plaintiff introduced evidence contradicting him. The question and the contradiction here affected the credit of the witness in the particular case in which he was examined. An established distinction exists between inquiries on cross-examination about irrelevant matters, which affect the general credit of the witness, and those which affect his credit in the particular case. The distinction is so well drawn in the decisions of this court, that I need not refer to other authorities. A party may sometimes ask on cross-examination as to declarations about irrelevant matters affecting the *general* credibility of a witness, but he must abide by the answer. He can not contradict the witness.—*Seale v. Chambliss*, 35 Ala. 19; *Rosenbaum v. State*, 33 Ala. 354; *Blakey v. Blakey*, 33 Ala. 611; *Ortez v. Jewett*, 23 Ala. 662. On the other hand, where a witness is questioned as to declarations affecting his credit in the case in which he is examined—affecting his particular credit—his answers may be contradicted.—*Lewis v. State*, 35 Ala. 380; *McHugh v. State*, 31 Ala. 317. The question in hand, and the contradiction of it, affected the *credibility* of the witness in the particular case, as contradistinguished from his general credit. The court therefore committed no error in allowing the question to Richards or the contradiction of his answer.

There are many other questions of evidence presented by the bill of exceptions. I have examined them all, one by one, and find no error in the ruling of the court on any of them. I do not perceive any beneficial result which can be produced by writing the arguments influencing me in reference to each one of them, and I see no mode of grouping them, and deciding them upon only general principles. The volume of this opinion would be greatly enlarged without profit to any person, and it would present no principle of law new or difficult. I shall therefore conclude by announcing that I have found no reversible error

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in any of the rulings of the court. My brother judges are both incompetent to sit in the case, because they were both of counsel. The parties have consented that my judgment shall be the judgment of the entire court. Nevertheless, this opinion is the opinion of myself alone.

Affirmed.

BOZEMAN vs. ROSE.

[ACTION FOR BREACH OF SPECIAL CONTRACT FOR DELIVERY OF COTTON.]

1. *Measure of damages.*—The measure of damages for the breach of a special contract, by which plaintiff loaned to defendant a specified quantity of cotton, of a designated quality, and defendant promised, in consideration thereof, to deliver to plaintiff, on a certain future day, the same quantity of cotton of like quantity, is the value of the cotton on the specified day of performance; and this principle is not affected by the fact that no place of delivery is named in the contract, nor by the further fact that the cotton is to be delivered in kind.
2. *Special affidavit in attachment cases; when necessary.*—When an attachment is sued out in an action to recover damages for the breach of a special contract, the measure of which damages is fixed by law, and can be “certainly ascertained” by a pecuniary standard, no special affidavit is necessary, under section 2503 of the Code.
3. *Same; sufficiency of.*—A special affidavit in an attachment case, (Code, § 2503.) being made for the single purpose of enabling the judge who grants the writ “to determine the amount for which a levy must be made”, does not perform the office of any part of the pleadings, and is not to be construed by the strict rules applicable to pleadings; its definiteness and sufficiency rests in the discretion of the judge, and cannot be tested by plea in abatement, nor be a subject of revision on appeal.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. F. BUGBEE.

THIS action was brought by Howell Rose, against Nathan and David W. Bozeman, and was commenced by original attachment, issued on the 4th August, 1865. The attach-

ment was sued out by Thomas Williams, as the agent of the plaintiff, on the ground that one of the defendants was about to remove beyond the limits of the State; and he also made a special affidavit before Judge BUGBEE, at the same time, in which he thus stated the cause of action: "On the 3d day of June, 1863, Howell Rose and Nathan and David W. Bozeman contracted as follows: Said Rose loaned to the said Bozemans forty-eight thousand eight hundred and forty-six pounds of ginned and packed cotton, classified as 'middling'; and the said Bozemans then and there contracted and agreed to deliver to the said Rose the same amount of the same classification of cotton on the 1st day of January, 1865; and although they have the cotton on hand, with which to pay said debt, they neglected and refused, and still do, to deliver said cotton." The circuit judge doubting the authority of said Williams, as agent, to sign plaintiff's name to the statutory bond, the latter promised that he would procure another bond to be signed by plaintiff himself; and he accordingly obtained such bond, three or four days afterwards, and, at the same time, procured plaintiff to make two affidavits, similar to the affidavits already made by said agent; which bond and affidavits were ante-dated, so as to correspond with the attachment. In the special affidavit thus made by plaintiff, the cause of action was stated in the same words as in the special affidavit of said agent; and in the other affidavit, stating the ground on which the attachment was sued out, it was averred that David W. Bozeman had left the State.

At the January term, 1866, which was the return term of the attachment, the cause was submitted to the presiding judge, on certain motions, which are thus stated in the bill of exceptions; "The counsel for the parties in this case agreed, that the foregoing are the facts of the case; that the cotton contract set forth in the affidavit is the demand for which the attachment was sued out; that if, on the foregoing facts, the defendants are by law entitled to have said attachment quashed on motion, or abated on any plea that could be framed on the foregoing facts, such motion to quash shall be deemed and taken to be duly made, and such plea or pleas in abatement to be duly framed,

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verified, and filed ; that if, on such motion or pleas, and on the foregoing facts, the law is in favor of the defendants, judgment is to be rendered by the court in favor of the defendants, and said attachment to be quashed, dismissed, or abated; and if otherwise, then judgment is to be rendered overruling such motion, plea, or pleas." It was further agreed, that the party against whom the judge decided the motions should have a right to revise his decision by appeal to this court. On these facts, the circuit court decided the motions adversely to the defendants ; to which they duly excepted, and which they now assign as error.

GOLDTHWAITE, RICE & SEMPLE, for appellants.

ELMORE, KEYES & GUNTER, and THOS. WILLIAMS, *contra*.

JUDGE, J.—Section 2503 of the Code is 'as follows : "Attachments may issue : 1. To enforce the collection of a debt, whether it be due or not at the time the attachment is taken out. 2. For any moneyed demand, the amount of which can be certainly ascertained. 3. To recover damages for a breach of contract, when the damages are not certain or liquidated. 4. When the action sounds in damages merely."

If the attachment be issued "to recover damages for a breach of contract, when the damages are not certain or liquidated", or in an "action sounding in damages merely", it must be issued by a circuit judge, or chancellor ; and in every such case, the judge or chancellor, before issuing it, must require the plaintiff, his agent, or attorney, in addition to the affidavit and bond required in other cases, to make affidavit in writing of the special facts and circumstances, so as to enable him to determine the amount for which a levy must be made.—Code, § 2508. In all other cases, the attachment may be issued without such special affidavit.

In the case before us, a special affidavit was made ; and in the court below, by agreement between the parties, a plea in abatement was considered as filed in due form and substance, to test its sufficiency. The affidavit describes the contract on which the suit is founded, as being in sub-

stance as follows : In June, 1863, the plaintiff "loaned" to the defendants a specified quantity and quality of ginned and packed cotton ; in consideration of which, the defendants agreed to deliver to the plaintiff the same quantity and quality of cotton, on the first day of January, 1865. It is averred in the affidavit, that the defendants neglected and refused to deliver the cotton ; but neither the place of delivery, nor the price of the cotton, is stated ; and these are urged as the grounds of objection to the affidavit.

The *gravamen* of the action being an alleged breach of this contract, for which alone the attachment was sued out, the first question we will consider is this:—Was it sued out for the recovery of a "moneyed demand, the amount of which can be certainly ascertained", within the meaning of the Code ; or "to recover damages for a breach of contract, when the damages are not certain or liquidated?" If the former, *no special affidavit* was necessary ; if the latter, then, such affidavit was necessary.

On the hypothesis of a breach of the contract by defendants, it is contended that the plaintiff's demand, arising therefrom, is not a "moneyed demand"; but if it is, the further position is taken, that it is not a "moneyed demand, the amount of which can be certainly ascertained", within the meaning of the Code.

When the contract is one by which the plaintiff is to receive, not money, but the transfer of certain property, on a breach of the contract, the value of the property is the measure of damages, "*because this is the remuneration fixed by the agreement.*"—Sedg. on Dam. 203, 193 ; *McDonald v. Oyer*, 21 Penn. 417. "If the consideration is to be paid in money, it must be paid ; if by the delivery of a thing of ascertained value, that value, if there is a breach, is the measure of damages."—*Strutt v. Farlan*, 16 M. & W. 249.

Taking the affidavit as a full and precise statement of the plaintiff's cause of action, we are invited to the consideration of a *supposed* state of pleadings and proof in the cause, and to what would be the results thereof, to bring us to the conclusion that the plaintiff's is not a moneyed demand. We decline to enter into such an investigation. No question is legitimately presented by the record requir-

ing it. If no cause of action exists, or if any good defense can be made to the action, the proper time to demonstrate it is on the trial of the cause, under appropriate pleadings and proof. The affidavit setting forth the contract, has not the character, nor was it intended to perform the office, of any part of the pleadings in the cause; nor can we visit upon it the strictness required in pleading. Viewing it only for the purposes of this case, in the attitude the case at present occupies, we hold it to be, *prima facie*, sufficient to show a "moneyed demand" in favor of the plaintiff; setting forth, as it does, a contract, and substantially averring a breach of that contract, and the law fixing the compensation for the breach in money.

If the demand sued for was a sum of money due by certain and express agreement, and the quantity was fixed and specific, and it did not depend upon any subsequent valuation to settle it, then it would be a *debt*, within the meaning of the first sub-division of the Code above quoted. But such is not the character of the plaintiff's demand; it is for *damages* for a breach of contract; and the damages resulting from the breach as alleged, are not uncertain, or unliquidated. "Unliquidated damages are such as rest in opinion only, and must be ascertained by a jury, the verdict being regulated by the peculiar circumstances of each particular case; they are damages which cannot be ascertained by computation or calculation—as, for instance, damages for not using a farm in a workmanlike manner; for not skillfully amputating a limb; for carelessly upsetting a stage, by which a bone is broken; for the breach of a marriage contract; and other cases of a like character, where the amount to be settled rests in the discretion, judgment, or opinion, of the jury."—Sedg. on Dam. 428; *Butts v. Collins*, 13 Wendell, 139. Damages are unliquidated, when there is no criterion provided by the parties, or by the law, for their ascertainment.—*McCord v. Williams*, 2 Ala. 71. They are certain, or liquidated, when the measure of damages is ascertained, or fixed, by the law of the contract, or the law operating upon the contract; or, when the facts upon which the demand is based being established,

the law is capable of measuring the damages accurately by a pecuniary standard.

The pecuniary standard in the case before us is, the value of the specific quantity and quality of cotton as named in the contract, on the first day of January, 1865. The fact that no place is named in the contract, as set forth in the affidavit, where the cotton was to be delivered, makes no alteration in the effect of the application of the principle announced. It matters not whether the legal construction of the contract is, that the cotton, being a ponderous article, was to have been delivered at the residence of the defendants, as is contended; or that, being a *loan*, it was to have been *returned* "*in kind*," to the *lender*. In either event, the pecuniary standard, by which the damages are to be measured, is the same. And when such a standard is provided, the damages are limited, specified, defined, and therefore *certain*, as opposed to *indefinite*; and, in the meaning of the Code, can be "*certainly ascertained*." "*Id certum est, quod certum reddi potest*."

This view of the law is fully sustained by the case of *Weaver v. Puryear & Williamson*, (11 Ala. 941,) in which it was held, that a demand for a breach of warranty of the soundness of a slave was one on which an action might be commenced by attachment, under the statute then in force, as, by the law acting upon the contract, the damages to which the party was entitled, upon a breach of the contract, was a sum capable of ascertainment. The effect of the decision in that case was, that the demand sued for was liquidated damages; and the decision is fully sustained by the authorities cited in the opinion of the court; especially by the case of *Fisher v. Consequa*, 2 Wash. C. C. 282. See, also, *Younge v. Holley*, 27 Ala. 203; *Gibson v. Marquis*, 29 Ala. 668.

It has been contended in argument, that no demand is embraced by the 2d sub-division of section 2503 of the Code, unless its very nature would authorize the suing out of an attachment upon it, as well *before*, as *after* its maturity; and that such not being the nature of the plaintiff's demand in this case, it can not be embraced by that sub-division. This argument must have been

made under a misapprehension of section 2503. By its express terms, there is but one class of cases in which an attachment can be issued, before the maturity of the demand; and that is when it is sued out "to enforce the collection of a *debt*." In all other cases, a right of action must have accrued, by the terms of the contract, or the nature of the transaction itself, before the right to an attachment to enforce any demand arising therefrom, can exist; and the premises of the argument being incorrect, the argument itself falls to the ground.

[2.] Our conclusion is, that no special affidavit was necessary in this case. But, if one was necessary, the plea in abatement could not be sustained. In cases requiring it, the special affidavit is made for the single purpose of enabling the judge or chancellor, issuing the attachment, "to determine the amount for which a levy must be made." When it is sufficient for this purpose, (and the judge or chancellor who is to act upon it must determine its sufficiency,) the requirement of the statute is fully satisfied. None of the other safeguards provided by the law, against injury and oppression in the use of the process, are dispensed with; and on the affidavit of the defendant, the amount for which the levy is made may be reduced, and the levy released to the amount of the reduction, at the return term of the attachment.—Code, § 2508. A statement of the facts and circumstances in the affidavit is required in no prescribed form, but as a predicate for the action of a judge or chancellor in a single matter, and as a step in a remedial proceeding conclusive upon no right of any party; and whether the statement shall be more or less definite and specific, must be regarded as resting in the discretion of the judge or chancellor, and not a proper subject for revision on appeal. Such has been the decision of the supreme court of Ohio, in an attachment case, involving a similar question.—*Harrison & Wiley v. King*, 9 Ohio St. R. 388. See, also, *Ex parte Banks*, 28 Ala. 28. To abate attachment suits, on pleas for defects in such affidavits, would not be "liberally construing the attachment law, to advance the manifest intent of the law."—Code, § 2562.

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A statute of New York requires one, desiring to commence an action of *tort*, against a non-resident, by a justice's warrant of attachment, to state *facts and circumstances* within his knowledge, showing that his claim arises *ex delicto*. Under this statute, it has been held in that State, that there was no revisable error where the affidavit stated that the plaintiff verily believed that he had a good cause of action for fraud and deceit in the sale of certain goods.—*Pope v. Hart*, 35 Barb. 630 ; U. S. An. Digest, vol. 16, p. 4, § 23.

This case having been brought into this court by appeal, before final judgment in the court below, by consent of the parties, pursuant to an act of the legislature, approved February 23, 1866, authorizing such appeals in cases like the present, (Pamph. Acts, 1865-6, p. 94,) we affirm the ruling of the court below, at the costs of the appellant, and remand the cause for further proceedings.

CLEMENS vs. WILSON.

[APPLICATION FOR MANDAMUS FROM CIRCUIT TO PROBATE COURT IN
MATTER OF GRANT OF ADMINISTRATION.]

1. *Grant of administration de bonis non*.—An order of the probate court, which purports to be granted on an application “for letters of special administration”; recites that “there has been a vacancy in the office of administration of said estate for more than forty days,” and that no person entitled to administration has applied; and thereupon orders that the said petitioners “be, and are hereby, appointed administrators of said estate, and that proper letters of administration issue to them, authorizing them to collect and preserve the property thereof,”—must be construed, when collaterally assailed in a subsequent application for the grant of administration *de bonis non*, as a grant of letters of administration *de bonis non*, since that is the only kind of grant authorized by the facts stated in the order; and if it further appears that the decedent's will is of record in said probate court, they must administer the estate according to its provisions.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. WM. J. HARALSON.

On the 12th March, 1866, James L. Clemens filed his petition in said court, praying a *mandamus*, or rule *nisi* for a *mandamus*, against Robert D. Wilson, the probate judge of said county, requiring him to grant letters of administration on the estate of James Clemens, deceased, to F. P. Ward and W. W. Garth, or to some other suitable person. The petition alleged that, on the 27th December, 1865, the petitioner filed his written petition in said probate court, asking to have the administration of said estate committed to said Ward and Garth; that on the 9th February, 1866, said application being still pending, "he asked the court to hear and pass upon said petition, and thereupon proved, to the satisfaction of the court, the death of said Clemens, and that he was a resident of said county at the time of his death,—the probate of his will in said court; the renunciation of the executors therein named; the grant of letters of administration (with said will annexed) of the estate of said decedent to Benjamin Patterson; the death of said Patterson, in 1863, without having made a final settlement of said estate; that there are debts of said estate unpaid, and assets unadministered, and a continued vacancy in the general administration of said estate, from the death of said Patterson to the present time; that said petitioner was an interested party in said estate, being an heir-at-law and a legatee under the will of said testator, and the only adult legatee under said will residing in the State of Alabama; that efforts had been made, during the year 1865, to get said estate committed to administration, by unsuccessful applications to other persons to accept the administration; that he now had the consent of said Ward and Garth to accept it; and therefore prayed the court to grant them letters of administration *de bonis non*, with the will annexed, on the estate of said James Clemens, deceased." The petition to the circuit court further alleged, that said Ward and Garth "were suitable persons, and tendered a sufficient bond"; and that the probate court declined to issue letters of general administration on said estate as prayed, "on the ground that on the 15th January, 1866, Thomas O. Burton, as the administrator of James C. Brandon, one of the heirs-at-law of said testator and

legatee under his will, *et al.*, had filed their petition in said court, praying the revocation of the probate of said will, and the admission to probate of another will of later date, the hearing of which was set for the second Monday in March, 1866; and special administration on the estate of said testator having been granted to L. P. Walker and R. C. Brickell on the 28th October, 1865, there was, in its judgment, no necessity for general administration until the application of said Burton and others was finally disposed of."

The probate judge filed an answer to the rule *nisi*, to which he appended a transcript from the records of his court, containing—1st, the proceedings which resulted in the probate of the decedent's will; 2d, the grant of letters of administration on his estate, with the will annexed, to Benjamin Patterson; 3d, the grant of letters of administration to Walker and Brickell; 4th, the application of Burton and others for the revocation of the probate of the will, and the admission to probate of a will of later date; 5th, the application of said Ward and Garth for the grant of administration to themselves, and the proceedings thereon had, which resulted in the refusal of said application. He further stated in his answer, that he overruled and refused the application of said Ward and Garth, "because, while said petition of Burton and others was pending and undetermined, respondent did not deem it proper to grant general administration, because such an administration would have required the execution of a will, the validity of which was contested"; while the order itself, as set out in the accompanying transcript, states that the court, "on the hearing, declined to grant administration on said estate for the present, and until there shall be a final determination as to the validity of the several wills contested before the court."

The order of the court granting letters of administration to Patterson, and the order granting letters to Walker and Brickell, as set out in said transcript, are in the following words:

"Comes Benjamin Patterson, in his own proper person, and makes an oral application to qualify and give bond as

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the administrator with the will annexed of the estate of James Clemens, late of said county, deceased; whereupon it is ordered by the court, that the said application be granted, and that he give bond and satisfactory security, conditioned as required by law, in the penal sum of three hundred thousand dollars. And the said Benjamin Patterson, together with Robert C. Brickell, Egbert J. Jones, John W. Scruggs, Thomas McCrary, Thomas McCalley, Benjamin Jolley, and Geo. W. Drake, his sureties, who are by the court approved, having entered into bond as aforesaid, and taken the oath prescribed by law, it is ordered by the court, that letters of administration with the will annexed on the estate of the said James Clemens, deceased, be issued to the said Benjamin Patterson accordingly."

"Come Leroy P. Walker and R. C. Brickell, and apply for letters of special administration; and it being shown to the court that there has been a vacancy in the office of administration of said estate for more than forty days, and no person entitled to administration having applied, and said applicants having taken the oath prescribed by law, and given bond in the sum of one hundred thousand dollars, with Joseph C. Bradley and Geo. W. Neal as sureties, which bond has been taken and approved by the judge of this court,—it is ordered that said Leroy P. Walker and Robt. C. Brickell be, and are hereby, appointed administrators of said estate of James Clemens, deceased, and that proper letters of administration issue to them, authorizing them to collect and preserve the property thereof."

The petition of Ward and Garth, as set out in the said transcript, alleged that Benjamin Patterson, the administrator, died in 1863, "since which time no letters of administration have been granted to any one, and said estate is now unrepresented, except by special administrators, L. P. Walker and R. C. Brickell, heretofore, to-wit, on the 28th October, 1865, appointed by this court"; and the following amendment to the petition is also copied in the record, though nowhere shown to have been allowed: "And no application is pending, or has been made, in this court, in behalf of any one claiming a right to administer upon said

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estate, for a grant of letters of administration *de bonis non*, with said will annexed."

The circuit judge, on the hearing, refused to grant a *mandamus*, and dismissed the petition; and his decision is now assigned as error.

GEO. W. STONE, and J. W. SHEPHERD, for appellant.

WALKER & BRICKELL, *contra*.

BYRD, J.—In the case of *Clemens v. Walker & Brickell*, decided at the present term, we refer to the difficulty of construing orders made by some of the courts of probate. This difficulty occurs often, and occurs in this case. The order appointing Walker & Brickell administrators of the estate of James Clemens, deceased, is set out in this record, but was not in the other. It is apparent that they applied "for letters of special administration"; but the character or kind of administration is not shown. An administration *de bonis non*, as is shown in the case of *Clemens v. Walker & Brickell*, is a special administration. Upon the application the court made the following order: "It is ordered that said Leroy P. Walker and Robert C. Brickell be, and are hereby, appointed administrators of said estate of James Clemens, deceased, and that letters of administration issue to them, authorizing them to collect and preserve the property thereof." The grounds for making the grant stated in the order are, 1st, "that there has been a vacancy in the office of administration of said estate, for more than forty days"; and, 2d, "no person entitled to administration having applied." Conceding that these two grounds authorized the court to appoint a special administrator, they certainly did not authorize it to appoint any but an administrator *de bonis non*.

The court, by its order, "appointed Walker & Brickell administrators of said estate of James Clemens, deceased"; and this appointment constituted them administrators *de bonis non* of said estate, under the authority of the case of *Moseley's Adm'r v. Mastin*, 37 Ala. 216, and authorities there cited.—*Broughton v. Bradley*, 34 Ala. 694.

It is the order of the court which confers the office of

administrator, and not the letters which are issued.—*Hosea v. Brasher*, 8 Porter, 559; 5 Ala. 264. The clause of the order, which directs “that letters of administration issue to them, authorizing them to collect and preserve the property thereof,” is merely directory as to the contents of the letters, and confers no power; but to restrict that previously granted, is the greatest effect that can be given to it. It is consistent with the duty of an administrator *de bonis non* “to collect and preserve property of an estate,” until he is authorized by the court to distribute it among the legatees or distributees, or sell it to pay debts, or for distribution. This is the only consistent construction we can give the order. It does not confer a *limited* administration *in time*, as all other special ones do, except an administration *de bonis non*. It has none of the *indicia* of such a limited administration, except that the court, in ordering letters to issue, directs that he be authorized to collect and preserve the property of the estate; and this is reconcilable with the grant of an administration *de bonis non*. All the other *indicia*, upon the face of the order, show it to have been such a grant: 1st, there is no ground set out in the order that would authorize any other than an administration *de bonis non*; 2d, such an administration is a *special one*; 3d, it is the only one and the proper one which ought to have been granted, upon the recitals of the order; 4th, the operative words confer a general, and not a special administration; but the case of *Moseley’s Adm’r v. Mastin*, *supra*, shows how such an order is to be construed; and the only thing in opposition to this view, is the direction given as to the contents of the letters of administration, which is shown to be reconcilable with the grant conferred by the operative words of the order.

We therefore hold, that the order, upon its face, conferred upon Walker & Brickell the office of administrators *de bonis non* of the estate; and the will being on record in the court from which they procured their authority, does not render the grant void, (*Broughton v. Bradley*, 34 Ala. 694,) and they must administer the estate subject to the provisions of the will, so long as its probate is operative and valid, unless the administrator in chief had fully executed

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the duties and trusts contained in it. There is, then, no necessity for the writ of *mandamus* to the judge of probate, and it must be refused.

The judgment is affirmed.

NOTE BY REPORTER.—On application by the appellant's counsel for a re-hearing, the following opinion was afterwards delivered :

BYRD, J.—We have carefully considered the able argument of the counsel for appellant, submitted in reply to the opinion of the court heretofore delivered in this cause ; and while we admit its force, we adhere to the reasoning and conclusion of that opinion, and re-affirm the decision of the judge of the circuit court of the 5th judicial circuit.

Affirmed at the costs of the appellant.

KIRK vs. MORRIS ET AL.

[BILL IN EQUITY TO ENFORCE STATUTORY RIGHT TO REPLEVY
ATTACHED PROPERTY.]

1. *Replevy of attached property by stranger.*—The word *stranger*, as used in the statute authorizing the replevy of attached goods in the absence of the defendant, (Code, § 2536,) means a person who is not a party to the suit, and who acts for the benefit of the defendant in attachment; and it is his duty, having thus replevied the goods, to deliver them, on demand, to the defendant, whose bailee he is, or to return them to the sheriff.
2. *Same.*—If two or more persons, strangers to the suit, offer to replevy, the sheriff necessarily has a discretion in choosing between them; in the exercise of which discretion, he ought to consult the interest of the defendant, in furtherance of the purpose of the law, and not the profit or advantage of the persons making the offer.
3. *Same.*—When a stranger offers to replevy for the benefit of the defendant, and his offer is improperly refused by the sheriff, he may enforce his statutory right, for the benefit of the defendant, in a court of law; but he has no such interest in the subject-matter of the suit as authorizes him to come into equity for relief, although he also

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alleges that, after refusing his offer, the sheriff allowed the goods to be replevied by other strangers, who therein acted at the instance, and for the benefit of the plaintiff.

APPEAL from the Chancery Court at Montgomery.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 10th January, 1866, by Eben Kirk, against Josiah Morris, W. C. Ray, A. F. Given, E. H. Metcalf, D. Browder, Edward H. Wilson, the Bank of Louisiana, (a corporation chartered under the laws of Louisiana, and doing business in the city of New Orleans,) and A. H. Johnson, the sheriff of Montgomery county. Its material allegations were these: That on the 10th July, 1865, an attachment was issued by J. H. Nettles, a justice of the peace in and for said county, at the suit of Edward H. Wilson, against the Bank of Louisiana; that said attachment was levied, on the same day, by W. H. Ogbourne, as special bailiff, on two hundred and twenty-seven bales of cotton in said county, as the property of the defendant in attachment; that under an order of the circuit court of the county, at its December term, 1865, to which said attachment was made returnable, said cotton was delivered into the possession of the sheriff, and he was directed by another order to sell the same as perishable property; that the sheriff accordingly advertised said cotton for sale on the 15th January, 1866; that on the 5th January, 1866, the complainant made application to said sheriff, to be allowed to replevy said cotton, and tendered to him a good and sufficient replevin bond; that the complainant was a stranger to said attachment suit, and not in any manner interested therein, and, in making said offer to replevy, "was acting for the benefit of the said Bank of Louisiana, and at the instance, and by the inducement of the persons who have the management, control, and direction of its affairs and business"; that the sheriff refused to accept said bond, and refused to allow complainant to replevy said cotton, "on the ground that there was an order made by said circuit court which did not allow him to permit said cotton to be replevied"; that on the 9th January, 1866, the said circuit court "declared said

order did not affect the right of any party to replevy the cotton, who was by law entitled to replevy the same"; that on said 9th January, 1866, the sheriff accepted a replevin bond for the cotton from said Morris, Ray, Given, Metcalf and Browder; that in giving this bond, and thus replevying said cotton, said obligors did not act for the benefit, or at the instance of said defendant in attachment, but acted for the benefit of said plaintiff in attachment, and at his instance and request, or under some arrangement with him; that this fact was known to the sheriff when he accepted their bond; and that there was danger of the removal of the cotton beyond the jurisdiction of the court. The prayer of the bill was, that the several defendants who had the possession or control of the cotton might be enjoined from removing, or otherwise disposing of it, and required to deliver it to the sheriff; and for such other and further relief as the nature of the complainant's case might require.

The chancellor sustained a demurrer to the bill, for want of equity, and his decree is now assigned as error.

ELMORE, KEYES & GUNTER, for appellant.—1. The complainant brought himself within the strict letter of the statute, (Code, § 2536,) when, being a stranger to the suit, and acting for the absent defendant in attachment, he tendered to the sheriff a good and sufficient replevin bond. This provision of the statute was designed for the benefit of absent defendants, and must receive a liberal construction to advance that purpose. To allow a stranger to replevy for his own benefit, or for the benefit of the attaching creditor, would contravene the purpose of the statute, and injure the very person whom it was intended to benefit.

2. The wrongful act of the sheriff, in refusing to accept a sufficient bond when tendered, deprived the complainant of a clear legal right, which he has no adequate remedy at law to enforce. A *mandamus* against the sheriff would be of no avail, because, having accepted a bond from the other defendants, he cannot now allow the complainant to replevy. If he cannot maintain a bill in his own name, then he has a right without remedy. The strictest requisitions of the rule, as to parties in equity, is complied with by making the

defendant in attachment a defendant to the bill.—Story's Eq. Pl. §§ 72, 76, note 2; 2 Calvert on Parties, 3-11; 8 Price, 377; 1 Beav. 600; 3 Beav. 494; 1 Daniell's Ch. Pr. 241-2, 254-5.

GOLDTHWAITE, RICE & SEMPLE, and CHILTON & THORINGTON, *contra*, contended—1st, That the right to replevy, given to strangers by the statute, was not confined to a mere agent or attorney of the defendant in attachment; and when several strangers offered to replevy, the sheriff must necessarily have a discretionary power to decide between them.

2. That if the complainant's offer to replevy was wrongfully refused, the circuit court in which the suit was pending, could afford him full redress.—*Fanning v. Dunham*, 5 Johns. Ch. 137-44; *Love v. Williams*, 5 Ala. 58; *Mobile Cotton Press v. Moore & Magee*, 9 Porter, 679; Code, sections 561-3.

3. That the complainant showed no interest, legal or equitable, in the subject-matter of the suit, which would authorize him to come into equity for relief.—Story's Eq. Pleadings, § 731.

JUDGE, J.—Goods or chattels taken in attachment, in this State, may be replevied by the defendant, "or, in his absence, by a stranger."—Code, § 2536. Who is a "stranger", within the meaning of this section of the Code? In determining this question, we will briefly notice the previous legislation on the subject.

Prior to the adoption of Aiken's Digest, the replevin bond in attachment cases was a mere bail bond, required to be payable to the sheriff, and to be assigned by him to the plaintiff; and in suits for the recovery of sums exceeding the jurisdiction of justices of the peace, even in the case of an absconding debtor, it was required to be executed by the defendant, his agent, attorney, or factor.—*Adkins v. Allen*, 1 Stew. 130; *Sartin v. Weir*, 3 Stew. & Port. 421; *Cummins v. Gray*, 4 Stew. & Port. 397; *Sewell v. Franklin*, 2 Port. 493. By section 11, page 40, of Aiken's Digest, which was adopted in 1833, it was declared, that the prop-

erty should remain in the custody of the officer, "unless the defendant, his or her agent or attorney, or some other person, replevy the same by giving bond", &c.—*Kinney v. Mallory*, 3 Ala. 626. In the section of the Code above cited, the word "*stranger*" was substituted for the words "*or some other person*", as found in Aiken's Digest. Both were intended, however, to mean the same thing, namely, a person not a party to the suit, who acts for the benefit of the defendant in attachment. This right was doubtless given to a stranger, to remedy the inconvenience and hardship which might result to the defendant, from a levy upon his goods in his absence, when he could have no opportunity of replevying them himself.

What are the rights of a defendant, as to his property taken in attachment, when it has been replevied by a stranger? It has been the settled law of this State, for a period of more than thirty years, that the levy of an attachment creates a lien in favor of the attaching creditor, which can not be divested by the replevying of the property; and that when attached, it is in the custody of the law, to abide the judgment in the particular case.—*McRae & Augustin v. McLean*, 3 Porter, 138; *Pond v. Griffin*, 1 Ala. 678; *Rives & Owen v. Wilborne*, 6 Ala. 48. The law, as thus declared, was not changed by the adoption of the Code; on the contrary, sections 2539 and 2470 evidently contemplated such to be the law. It is well settled, also, that by the replevying of the property, the defendant, pending the suit, has the right of possession, though his custody is, for the time, the custody of the sheriff. "The two interests may well exist together: the one respects the *right*, the other the *possession*, of the property."—*McRae & Augustin v. McLean*, *supra*.

In providing for a replevy by a stranger, it was not the intention of the legislature to restrict or impair the defendant's right as to the possession of the property, when replevied; otherwise there would be the anomaly in the law of a remedial statute perpetrating injury and oppression upon those whom it was intended to benefit. The term "replevy" means, "to redeliver goods which have been distrained, to the original possessor of them, on his giving

pledges", &c.—2 Bouvier's Law Dic. 450. And when words are used in a statute which have a fixed and definite meaning at common law, the inference is, that they were intended to be used in their common-law sense.—*Ex parte Vincent*, 26 Ala. 145.

When property attached has been replevied by a stranger, the defendant has the right to demand of the stranger the possession of it ; and on such demand being made, it is the duty of the stranger, either to restore the property to the defendant, or to return it to the sheriff. In the latter event, the defendant may exercise the right of replevying it himself ; and in neither event will the right of possession, given by the law to the defendant, be abridged or impaired. No valid objection can exist, in such case, to the return of the property to the sheriff, by the stranger, in the discharge of his bond, should he elect to pursue that course ; and it is believed to be sanctioned by authority.—*McRae & Augustin v. McLean*, *supra*. The stranger, as to the possession of the property after he has replevied it, stands as a bailee for the defendant, without reward ; he is a depositary who is to keep the property with the ordinary care applicable to the case under the circumstances, and who cannot make use of the property without the consent of the defendant, expressly given or reasonably implied ; and who is bound, as before stated, to restore it to the defendant, or return it to the sheriff, upon demand.—2 Kent, 561.

On the demand of the defendant, if the property be not restored to him, or returned to the sheriff, what would be the defendant's remedy ? Whether it would be in a court of law, or in a court of equity ; or whether the jurisdiction of the two courts, in such case, would be concurrent, we need not decide, as these questions are not legitimately presented in this case. We may remark, however, that a stranger, who has replevied property taken in attachment, ceases to be a stranger to the suit, from the time the replevin bond is executed, and the property is delivered to him. By the act of replevying, he introduces himself to the suit, and becomes, though not a technical party, yet a party to the proceedings ; and being in the possession of property which is in the custody of the law, is he not within the

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legitimate reach of proper action, in regard to the property, by the court in which the suit is pending? A replevin bond, when given by a stranger, is subject to such rules as would govern it if made by the defendant in attachment himself.—*Kinney v. Mallory, supra*; also, *Braley v. Clark*, 22 Ala. 361.

2. When more persons than one, not parties to the suit, make application to replevy, the law prescribes no rule by which the officer shall be governed in deciding as to who among them may exercise the right. From the character of the particular duty to be performed, this must necessarily be left very greatly to the discretion of the officer, as is the case in the performance of many ministerial duties by officers, involving as to themselves responsibility and the risk of pecuniary loss. A contrary rule might lead to contests and litigation, producing delays, and defeating the beneficial purpose intended to be accomplished. In every such case, let whoever may succeed in replevying the property, the duties and responsibilities cast upon him by the law in regard to it are the same. The officer, however, in the exercise of the discretion vested in him, should not abuse it. He should remember that the object of the law, in permitting the property to be replevied, is not to give profit or advantage to any one, at the expense of the defendant; but that it is to relieve the property from the actual custody of the officer, and restore it to the defendant, and thereby to save the expenses, and secure to the plaintiff a return of the property, or the payment of the debt, in the event of a recovery.

3. It follows, from the views we have expressed, that the complainant in the case before us acquired no interest or estate whatever in the property attached, by his offer to replevy it for the benefit of the defendant, although his offer was refused by the sheriff; and that consequently, he is entitled to maintain no suit in equity, in respect of the property, or of the right to its possession.—*Dursley v. Berkeley*, 6 Vesey, 252; *Allan v. Allan*, 15 Vesey, 135.

The person entitled to replevy, under section 2536 of the Code, though a stranger, might enforce the right, if refused him, for the benefit of the defendant, in a court of law.

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In the latter court, (unless the rule be changed by statute, as it is to a certain extent in this State, by section 2129 of the Code,) suits must be instituted in the name of the person having the legal title. But a court of chancery requires the real party in interest to bring the suit, except in certain cases where the complainant represents the rights of those for whom the suit is brought, both legally and equitably, as in the case of executors, or of trustees, &c.—*Sedgwick v. Cleveland*, 7 Paige, 287; *Oakey v. Bend*, 3 Edw. Ch R. 482; also, *Stone v. Hale*, 17 Ala. 557.

In this case, the complainant has no interest in the subject-matter of the suit, or right to the thing demanded, and no proper title to institute the suit; therefore, the bill was properly dismissed by the chancellor for the want of equity. Story's Eq. Pleadings, §§ 728, 301, 260, 261.

The view we have taken of the case renders it unnecessary to examine the other questions presented and argued, both at the bar, and upon the briefs of counsel.

Let the decree of the chancellor be affirmed.

McCOY vs. HARRELL, NICHOLS & CO.

[ACTION ON PROMISSORY NOTE EXECUTED IN PARTNERSHIP NAME.]

1. *Verification of plea of non est factum*.—A plea which states, in its body, that "the defendant, for answer to the complaint," saith that he did not sign the note sued on, &c., "and he makes oath that this plea is true," and which is shown by the record to have been sworn to before the clerk, appears with sufficient certainty to have been verified by the oath of the defendant, although it is signed by his attorneys, and not by himself.
2. *Judgment by default after plea filed*.—A judgment by default, in an action on a promissory note, will be reversed on error, when the record shows that a plea of *non est factum*, duly verified by affidavit, was on file.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Harrell, Nichols & Co., against Daniel H. McCoy, to recover the amount alleged to be due on "a promissory note made by McCoy & Goss on the 20th March, 1857, and payable five months thereafter to the said Daniel H. McCoy, being one of the firm of McCoy & Goss, with interest thereon and protest fees"; and was commenced on the 8th August, 1859. The record contains a plea, which is in the following words: "The defendant, for answer to the complaint, saith that the note upon which this action is founded, signed 'McCoy & Goss,' was not executed by him, or by any one authorized to bind him; and he makes oath that this plea is true." This plea is signed by Richards & Falkner, attorneys for defendant; and beneath it is a memorandum, signed by the clerk, in these words: "The above plea sworn to before me, this 12th day of September, 1859." Judgment by default was rendered at the fall term, 1859, (the record does not show on what day,) and that judgment is now assigned as error.

J. FALKNER, for appellant.—It was error to render judgment by default when there was a valid plea on file.—*Crow v. Decatur Bank*, 5 Ala. 249. The plea set out in the record is in the form prescribed by the Code, (p. 556,) and must be held sufficient.—*Letondal v. Huguenin*, 26 Ala. 552; *Cumming v. Richards*, 32 Ala. 459. It is not essential to the legal sufficiency of the verification that it should be signed.

W. H. BARNES, *contra*.—A judgment by default will not be reversed on error because an affirmative plea was put in.—*McCollum & Capell v. Hogan*, 1 Ala. 515; *Dougherty v. Colquitt*, 2 Ala. 337; *Crow v. Decatur Bank*, 5 Ala. 244. The same rule must apply here, when an insufficient plea appears to have been put in. The statute dispenses with proof of the note which is the foundation of the suit, unless denied by plea verified by affidavit.—Code, § 2279; *Ala. Coal Mining Co. v. Brainard*, 35 Ala. 476. The plea purports to be sworn to by the defendant, but it is signed by his attorneys, and not by himself; and the clerk's memorandum does not remove the doubt. The clerk's state-

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ment may be true, and yet the defendant may have never seen the plea.

JUDGE, J.—The plaintiff in the court below sued the defendant on a promissory note, purporting to have been executed by “McCoy & Goss.” The defendant McCoy interposed a plea of *non est factum*, in the words of the form for such pleas, prescribed by the Code. Section 2279 of the Code provides, that “all written instruments, the foundation of the suit, purporting to be signed by the defendant, his partner, agent, or attorney in fact, must be received in evidence, without proof of the execution, unless the execution thereof is denied by plea, verified by affidavit.” It is contended, in the case before us, that it does not appear that the plea was sufficiently verified by affidavit.

It is the settled law of this State, that in all cases where, under our statute, or according to our practice, a plea must be verified by oath, the oath is a part of the plea, so much so, that without it the plea may be stricken out on motion. *Hunt v. Test*, 8 Ala. 713; *Sorrelle v. Elmes*, 6 Ala. 706. Therefore, as has been repeatedly held, a demurrer to a plea reaches the want of an affidavit, when one is necessary.—*McAlpin v. May*, 1 Stew. 520; *McWhorter v. Lewis*, 4 Ala. 198.

The oath and the plea, then, being parts of the same instrument, the two must be looked at and construed together, to determine what has been sworn to, and by whom. In this case, after the averment that the note was not executed by the defendant, nor by any one authorized to bind him in the premises, it is recited in the plea, that the *defendant* “*makes oath that this plea is true*”; and at the foot of the plea, the clerk certifies as follows: “The above plea sworn to before me, this 12th day of September, 1859.” These recitals, in the plea, and in the certificate of the clerk, taken together, make it clear, in our opinion, that the plea was verified by the affidavit of the defendant.

Even in pleas in abatement, where matters of form are regarded as substance, it has been held that the terms “sworn to and subscribed in open court,” at the foot of the plea, (as certified by the clerk,) is a sufficient compliance

with the statute, which requires such pleas to be accompanied with an affidavit of their truth.—*Powers v. Bryant's Adm'r*, 7 Porter, 10 ; *State v. Middleton*, 5 Porter, 484. And in such pleas, it is not essential that they should be verified by the oath of the defendant, or that they should be signed by him ; their truth may be shown by the affidavit of *another person* ; and they may be signed by *counsel*.—*Prim & Abbott v. Davis*, 2 Ala. 24 ; *DeForest, Morris & Wilkins v. Elkins*, 2 Ala. 50. No sufficient reason is perceived why the same rules should not be applied to pleas of *non est factum*. Neither the statute which requires pleas in abatement to be verified by oath, nor the statute which makes the same requirement as to pleas of *non est factum*, directs by whom the oath shall be made. But, as we have already said, we think it sufficiently appears in the case before us, that the plea was verified by the affidavit of the defendant himself.

2. It is true, as a general rule, that where a defendant pleads an affirmative plea, the *onus* of proving it lies upon himself ; and if he does not appear to sustain his plea, and a judgment by default is rendered in favor of the plaintiff, it will not be reversed on error, for the irregularity works no injury.—*Dougherty v. Colquitt*, 2 Ala. 337 ; *McCollum & Capel v. Hogan*, 1 Ala. 515. But, when a sworn plea is interposed, denying the execution of the instrument sued on, the rule stated has no application. In such case, the parties stand as they did at common law, when the general issue was pleaded, which devolved on the plaintiff the necessity of proving the execution of the instrument sued on ; and such proof not having been made by the plaintiffs in this case, it was error to render a final judgment by default against the defendant.—*Crow v. The Decatur Bank*, 5 Ala. 249.

Let the judgment be reversed, and the cause remanded.

ZACHARY vs. CADENHEAD.

[ACTION AGAINST MARRIED WOMAN ON PROMISSORY NOTE.]

1. *Sufficiency of complaint, in action against wife for debt contracted before marriage.*—Under the provisions of the Code, (§ 1981,) the wife is liable for a debt contracted by her before marriage, as if she still were unmarried; and in declaring against her on such debt, it is not necessary to aver that she has a separate estate.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Monroe Cadenhead, against Mrs. Priscilla Zachary, and was commenced on the 12th September, 1859. The complaint was in the following words: "The plaintiff claims of the defendant the sum of six hundred and eighty-seven 81-100 dollars, due by promissory note made by her, under and by the name of Priscilla Hagin, on the 22d February, 1858, and payable to Nancy B. Cadenhead, or bearer, on the 25th December, 1858, with the interest thereon; which said note is the property of plaintiff. And plaintiff further avers, that the said Priscilla Hagin, after the execution of said note, intermarried with one Abner Zachary, and is now the wife of said Abner Zachary, and has a separate estate."

The defendant demurred to the complaint, "in short by consent," and assigned the following as grounds of demurrer: "1st, that said complaint fails to set forth what separate estate was held by her; 2d, that it fails to proceed against and point out the separate estate against which plaintiff proceeds; 3d, that it does not aver that the defendant had a separate estate at the making of the note; 4th, that it fails to aver that she had said separate estate when the suit was commenced, and fails to describe said separate estate; 5th, that it fails to aver that she has a separate estate under the statute." The court overruled the demurrer, and the defendant pleaded, "in short by consent, that

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at the time of the commencement of this suit, the defendant was a married woman, the wife of A. D. Zachary, and that she did not, at the time of making said note, nor at the time of the commencement of this suit, have any separate estate under the statutes of the State of Alabama; but that she had a separate estate, consisting of slaves, created by will before the first day of January, 1848." The plaintiff demurred to this plea, "in short by consent," and assigned the following as causes of demurrer: "1st, that the averments of said plea present no answer to said complaint; 2d, that said plea does not aver that the defendant was a married woman at the time of the making of said note; 3d, that said plea does not negative the fact that, at the time said note was executed, the defendant was unmarried, and has since married; 4th, that a married woman may be sued alone, for debts contracted before her marriage, and the plea does not negative these facts." The court sustained the demurrer, and, the defendant declining to plead over, rendered judgment for the plaintiff, for the amount due on the note. The judgment of the court, and its rulings on the pleadings, are now assigned as error.

GUNN & STRANGE, for appellant.

CLOPTON & LIGON, *contra*.

BYRD, J.—The husband is not liable for a debt of the wife contracted before marriage, if contracted since the adoption of the Code.—Code, § 1981. To recover on such debt, she must be sued alone, and her separate estate is liable to the satisfaction thereof, as if she were an *unmarried woman*. If unmarried, certainly, at common law, and under our statute law, any estate, separate or other, then belonging to, or afterwards acquired by her, would be liable to the satisfaction of such a debt, as long as she was the owner thereof and unmarried; and in a suit on such a debt against her after marriage, it would be unnecessary to aver that she had or has a separate estate, in order to entitle the plaintiff to a recovery; for, as to that debt, and as to the liability of her separate estate to its satisfaction, she

has to be sued, and satisfaction of the judgment enforced, "as if she were an unmarried woman."

Before her marriage, the creditor could sue her, and obtain a general judgment; and all property then owned by her, or acquired afterwards, would be liable to the satisfaction of the judgment. Section 1981 of the Code does not change this liability by the act of marriage, but, as to antenuptial debts, leaves her liability unchanged. To hold otherwise, would be to allow her to change her relation and liability to her creditors by her own act, and to lessen their security; while at common law, the act of marriage did change that relation and liability, but it increased the security of the creditor, by making the husband also liable for the debt during marriage.

The averment in the complaint, that she had "a separate estate," was unnecessary, and surplusage.

The case of *Ravisies v. Stoddart & Co.*, (32 Ala. 599,) and other cases in harmony with it, are not in conflict with the doctrines of this opinion. Those cases are founded on section 1987 of the Code, and are expressly put upon the ground that, for the contracts specified in that section, "the separate estate of the wife is liable, to be enforced by action at law" against the husband and wife jointly, or against him alone. The rules, therefore, laid down in those cases, are not applicable to this.

The complaint, being in conformity to the views above expressed, and to sections 2227 and 2228 of the Code, was sufficient; and the court properly overruled the demurrer to the complaint, and sustained the demurrer to the plea. The judgment rendered by the court is correct in form and substance.

The judgment is affirmed.

CROOK vs. CHAMBERS.

[MOTION FOR JUDGMENT ON AWARD.]

1. *Sufficiency of statutory award, and admissibility of parol evidence in aid of.*—It is not indispensable to the sufficiency of a statutory award, (Code, § § 2710–21,) that it should show on its face that the arbitrators were sworn, and that the parties had notice; but these facts may be proved by parol, on motion to enter up the award as the judgment of the circuit court.
2. *Delivery of copy of award to parties.*—The provision of the statute, requiring the arbitrators to deliver a copy of the award to each of the parties, is directory merely; and a compliance with it is not indispensable, if the award is otherwise substantially sufficient.
3. *Judgment on award.*—An award which contains a substantial compliance with the statutory requisitions, may be made the judgment of the circuit court on motion.
4. *"Stay-law" not applicable to statutory award.*—An arbitration is not a suit, within the provisions of the act approved February 20, 1866, entitled "An act to regulate judicial proceedings"; consequently, that act does not prevent the rendition of a judgment on motion on an award, at the first term after the award is made.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JNO. K. HENRY.

THIS was a motion for a judgment on an award, in favor of Geo. W. Chambers, and against James A. Crook. The award, and the submission on which it was founded, were in the following words :

"We, the subscribers, having a controversy respecting the balance of accounts between us, for the settlement of the same, have chosen E. H. J. Mobley and John Moore, esquires, arbitrators, by whose award, or any two of them, we do promise to abide; provided it is made in writing, on or before the 15th day of November next ensuing; and for abiding by and performing the said award, we bind ourselves, each to the other, in the sum of one thousand dollars. In witness whereof, we have hereunto set our hands and seals, this 24th day of October, A. D. 1865.

Crook v. Chambers.

“Sealed and delivered in } “J. A. CROOK, [L. S.]”
 presence of us, and deliver- } “G. B. CHAMBERS, [L. S.]”
 ed by both parties to E. H. }
 Mobley, for safe-keeping.

“State of Alabama, } We, the arbitrators chosen by
 Wilcox County. } James A. Crook and George W.
 Chambers, to settle and determine a controversy between
 them concerning the balance of their accounts, as by their
 submission and obligation in the hands of John Moore will
 appear, having accepted the said arbitration, and duly con-
 sidered the process and obligation of the parties, do award,
 that there is a balance due to George W. Chambers, upon
 said accounts, of three thousand eight hundred and seventy-
 three 66-100 (\$3,873.66) dollars; and further award, that
 the said James A. Crook pay the same to the said George
 W. Chambers, in sixty days from the date of this award,
 in full satisfaction of all accounts between them. Witness
 our hands, this 14th day of November, 1865.”

(Signed by both of the arbitrators.)

At the April term, 1866, Chambers moved the circuit court to enter up the award as the judgment of the court; and on the hearing of his motion, as the bill of exceptions states, offered the submission and award in evidence. The defendant raised several objections to the admissibility of these papers as evidence, founded on alleged failures or omissions to comply with the provisions of the internal-revenue laws of the United States; which objections were overruled by the court, but which require no particular notice; and to the overruling of these several objections the defendant excepted. “The plaintiff then asked leave of the court to prove, by parol, that the arbitrators, before entering upon the discharge of their duties as arbitrators, were regularly sworn, and that the parties had notice. The defendant objected to this motion; but the court overruled the objection, and admitted the evidence; to which the defendant excepted. This being all the evidence introduced by the plaintiff, he thereupon moved for a judgment on the award; to which the defendant objected, on the following grounds: 1st, that the evidence showed that this

was an arbitration at common law; 2d, because the award did not show that the arbitrators were sworn before entering on their duties; 3d, because the award did not show that the parties had notice of the meeting of the arbitrators; and, 4th, because the 'stay-law,' passed at the session of the legislature in 1866, did not authorize a judgment to be entered at the present term of the court. The court overruled these several objections, and rendered judgment on the award, in favor of the plaintiff, for the sum of three thousand eight hundred and seventy-three 66-100 dollars; to which ruling and action of the court the defendant excepted."

The judgment of the court, and the several rulings to which exceptions were reserved, are now assigned as error by the defendant.

PETTUS & DAWSON, and COCHRAN & DAWSON, for appellant.

1. The cases of the *Tuskaloosa Bridge Company v. Jemison*, (33 Ala. 476,) and *King v. Jemison*, (33 Ala. 499,) are not conclusive of the questions in this case. In those cases, the submission and awards were held to be perfect without extraneous evidence, and execution had been issued *without any order of the court*; and the motion to quash that execution was overruled. In those cases it appeared, *on the face of the award*, that the arbitrators were sworn, and that the parties had notice and copies of the award. No motion was necessary to make the award the judgment of the court. The awards were statutory judgments, when filed in the circuit court, *without the action of the court*.—Code, § 2714. But, in this case, three essential requisites, necessary to a valid statutory award, are wanting: 1st, It does not appear on the award that the arbitrators were sworn; 2d, it does not appear on the award that the parties had notice; 3d, it does not appear on the award, or anywhere in the record, that a copy of the award was delivered to Crook, or to any one for him.—Code, §§ 2712, 2716.

2. If the award possessed all the requisites of a valid statutory award, then it could have sustained an execution issued without an order of the court; and this is the true test, by which to determine whether the award is a

statutory award or not. Suppose this award had been filed, and execution issued on it, and Crook had moved to quash the execution; no court could have refused the motion, because of the three defects noticed.

3. There is but one sort of statutory awards; that is, an award which will sustain an execution issued by the clerk without any order of the court. But suppose that this court, by judicial construction, determines that there is another sort—that is, awards which may become judgments, when made so by the order of the court on motion; then that motion is a suit, and cannot be tried the moment it is made, as in this case. It is subject to the provisions of the “stay-law,” which applies to *all suits* not specially excepted.

MILTON JENKINS, *contra*, cited and relied on the following cases: *King v. Jemison*, 33 Ala. 499; *Tuskaloosa Bridge Company v. Jemison*, 33 Ala. 476; *Willingham v. Harrell*, 36 Ala. 583.

A. J. WALKER, C. J.—It is not indispensable in a statutory award, that it should disclose upon its face the fact that the arbitrators were sworn, and that the parties had notice. Those facts are not required by the statute to be evidenced by writing, and may therefore be proved by parol.—Code, §§ 2711–2716.

2. The provision, that a copy of the award shall be delivered to each of the parties, is directory, and a compliance with it is not indispensable. A substantial compliance with the law is sufficient. “In relation to the award, the point of substance under the statute is, that the arbitrators should take the oath prescribed, and should either give the notice prescribed, or have the parties before them, before they proceed to hear and determine the matters referred to them; and that a majority of them should make and sign an award, determining the matter or controversy submitted.”—*Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476. This “point of substance” is found in this case; and, besides, there is an unobjectionable submission in writing. The award was, therefore, a valid statutory award.

3. The argument that a statutory award cannot be made the judgment of the court, cannot be sustained. It is at war with section 2710 of the Code; and the contrary is expressly ruled by this court in *King v. Jemison*, 33 Ala. 499.

4. An arbitration is not a suit in court within the meaning of the "Act to regulate judicial proceedings," approved 20th February, 1866. It is a proceeding before triers chosen by the parties themselves. It is not an action commenced in court, in which there may be an appearance term, a pleading term, and a judgment term. We therefore hold, that there was no error in the refusal of the court below to withhold judgment for the time prescribed in that act.

Affirmed.

SOWELL vs. SOWELL'S ADM'R.

[APPLICATION FOR REVOCATION OF PROBATE OF WILL AND GRANT OF LETTERS OF ADMINISTRATION.]

1. *Probate of will without notice to heirs and distributees.*—When a will has been admitted to probate, without notice to the parties who are by law entitled to notice, the probate will be set aside on their timely application.
2. *Parties to petition to set aside probate.*—It is not necessary in such case, though it is the better practice, that the petition should state who all the parties in interest are; but the record must show that they were all notified of the application.
3. *United States internal-revenue tax on judicial process.*—If congress has the constitutional power to tax the judicial process of the State courts, the act which requires an internal-revenue stamp "upon writs, or other original process, by which any suit is commenced in any court of record", (13 U. S. Statutes at large, 110,) nevertheless does not apply to a petition filed in the probate court, asking the revocation of the probate of a will.

APPEAL from the Probate Court of Dale.

IN the matter of the estate of George Sowell, deceased, on the petition of Robert G. Sowell to set aside the probate of the last will and testament of said decedent, and to revoke the letters of administration previously granted by said court to George N. Traywick. The petition was filed on the 10th day of March, 1866, and alleged, that said decedent died on the 11th September, 1863, after having executed his last will and testament, of which the petitioner and one F. D. Traywick, since deceased, were appointed the executors; that on the 21st September, 1863, said will was propounded for probate in said court by George N. Traywick, who also prayed the grant of letters of administration to himself; that said Traywick was neither a legatee under said will, nor a distributee of the decedent's estate, nor a creditor, nor in any manner interested in the estate, and had no right to propound the will for probate, nor to apply for the grant of letters of administration; that said probate court rendered a decree, on the 12th October, 1863, admitting said will to probate, and granting letters of administration to said Traywick; that the petitioner in this case, who was a son of the decedent, was absent in the army when these proceedings were had in the probate court, and had no notice of them, and that he had never renounced the executorship of the will. The petition further alleged, that on the 14th October, 1863, said Traywick applied to said court for an order to sell all the property of said estate, for distribution among the parties interested; that on the 24th and 25th days of December, having obtained the order for sale, he sold all the property, both real and personal, becoming himself the purchaser; that he never made any distribution of the proceeds, but alleged that he had invested the money in Confederate States bonds. The prayer of the petition was, that the probate might be set aside, and the grant of letters of administration to Traywick revoked.

The defendant appeared, in answer to the citation, and moved to dismiss the petition, on the following (with other) grounds: 1st, "because said petition does not disclose who are the legatees or parties in interest"; 2d, "because said will, having been once probated in this court, cannot be set

aside in this proceeding"; 3d, "because said petition is not stamped, as by law required." The court dismissed the petition, because it was not stamped; to which ruling and decision the prisoner excepted. The decree of the court, dismissing the petition, is now assigned as error.

W. C. OATES, for the appellant.

MARTIN & SAYRE, *contra*.

JUDGE, J.—By repeated adjudications of this court, it has been settled, that when a will is admitted to probate, without notice having been given to those who are entitled to notice, the probate will be set aside on proper application. In *Roy v. Segrist*, (19 Ala. 810,) this question was involved; and the judge who delivered the opinion of the court in that case, said: "We entertain no doubt upon the point made by the counsel for the plaintiff in error, that it was the *duty* of the judge of probate, if the will was admitted to be proved in the absence of notice to the next of kin, to set aside such probate, upon the application of any one of such kin, provided the law requires them to be notified. Such is the constant practice of the ecclesiastical courts of England." And such, too, as we have already said, is the settled law of this State.—*Hill v. Hill's Ex'r*, 6 Ala. 166; *Stapleton v. Stapleton*, 21 Ala. 587; *Bradley v. Andress*, 27 Ala. 596; *Lovett v. Chisolm*, 30 Ala. 88.

It appears from the allegations of the petition in the case before us, that an instrument purporting to be the last will and testament of George Sowell, was propounded for probate, by the appellee, in Dale county, on the 21st of September, 1863, which was seventeen days only after the death of the testator, the proponent having no interest in the estate, either as a distributee, or as a devisee under the will; that on the 12th of October, 1863, the court admitted said instrument to probate, as the last will and testament of said George Sowell; that the petitioner is the son of said George Sowell, deceased, and was, at the time said instrument was propounded for, and admitted to probate, absent in the military service of the then Confederate States, and had no notice of the proceedings; and a prayer

is made to set aside the probate. Many other allegations are made in the petition, which it is unnecessary to notice, which should have been regarded by the probate court as surplusage.

If the proper parties had been notified of the application, it was the duty of the probate court to have entertained the petition, and given the right to the adverse parties in interest to contest it; and if satisfied by evidence of the truth in substance of the allegations above set forth, to have vacated the probate of the will, and repealed the letters of administration with the will annexed, to the appellee.

2. It was not necessary, though such is the better practice, that the petition should have disclosed who were all the parties in interest. In such a case, however, all the parties in interest should be brought to the notice of the court in some way, and be regularly notified of the application. The proper practice in this regard, is designated in *Hill v. Hill's Ex'r*, 6 Ala. 166. It is, on the filing of the petition, to apply to the judge of probate for a citation to the executors and other parties in interest, to appear on the day set for the hearing, and show cause why the probate of the will should not be vacated, and the letters testamentary or of administration be repealed; and the record of the proceeding should show that the parties in interest have been notified of the application.

3. If congress has the constitutional power to tax judicial process of the State courts,—a proposition we by no means affirm—a petition of the character of that filed in the present case, does not come within the letter or meaning of the act of congress which requires a stamp upon “writs, or other original process, by which any suit is commenced, in any court of record, either of law or equity.”—U. S. Statutes at large, vol. 13, p. 110. Consequently, a revenue stamp upon the petition was not necessary, even if that portion of the act of congress is constitutional.

It follows that the probate court erred in dismissing the petition; and its decree must be reversed, and the cause remanded.

JOHNSON vs. JOHNSON'S ADM'R.

[PETITION TO SET ASIDE ORDER FOR SALE OF DECEDENT'S REAL ESTATE.]

1. *Validity of order of sale of decedent's realty.*—An order for the sale of a decedent's realty in this case, founded on a petition which alleged that a sale was necessary for the purpose of making an equitable division among the parties interested, held void under the provisions of the act approved February 7, 1854, entitled "An act to regulate the sale of real and personal property by executors and administrators." (Session Acts, 1853-4, p. 55.)
2. *Void order of sale set aside.*—The probate court has power, and it is its duty, on a proper application being made, to set aside and vacate, at any time, an order for the sale of a decedent's real estate, which is void on its face, or shown to be void by the matters of record connected with it.

APPEAL from the Probate Court of Henry.

IN the matter of the estate of Sarah M. Johnson, deceased, on the application of John D. Johnson and Charles E. Johnson to set aside an order for the sale of the real estate. The petition was filed on the 26th March, 1866 and sought to set aside and vacate the order of sale on the following grounds: "1st, because said lands are not accurately described in the administrator's application to sell the same; 2d, because the ages of the heirs-at-law are not stated in said application; 3d, because the residence of the heirs-at-law is not stated in said application; 4th, because said application was heard and determined before the expiration of forty days after it was filed in the office; 5th, because notice of the filing of said application, and of the day set to hear and determine the same, was not given as by law provided; 6th, because the guardian *ad litem*, appointed to represent the minor heirs of said deceased on the hearing, did not deny the allegations in said application, as by law required; 7th, because said house and lot was sold for a price greatly disproportionate to its real value; 8th, because J. D. Johnson was not made a party to the

proceedings for the sale of said land, having had no notice of the filing of said application ; 9th, because there was no necessity for a sale of said land at that time, said estate being free from debt ; 10th, because J. M. B. Kelly, guardian *ad litem*, was not notified of his appointment as such guardian ; 11th, because the evidence used on the hearing of said application was not such as the law requires, no commission having been issued, and the witnesses having answered the interrogatories without being sworn ; 12th, because notice that the commission would issue was not served on the guardian *ad litem* ten days before the commission should issue ; 13th, because a copy of the interrogatories was not served on said guardian *ad litem* ten days before the commission should issue."

The petition of the administrator, on which the order of sale was founded, and which was filed and sworn to on the 15th January, 1864, was in these words : "The undersigned, administrator of the estate of Sarah M. Johnson, deceased, represents unto your honor, that said deceased died seized and possessed of a house and lot, situated in the town of Woodville, Henry county. He further represents that the heirs-at-law of said deceased are, J. D. Johnson and Charles E. Johnson. He further represents, that a sale of said property is necessary for a fair, equal, and beneficial division among said heirs. Wherefore, he prays your honor for an order authorizing and empowering him to sell said property for said purpose."

The order made on the filing of the petition, the order of sale, the report of the administrator, and the order confirming it, are in the following words :

"Came this day, James Pynes, administrator of Sarah M. Johnson, deceased, and filed application, under oath, for the sale of a house and lot of said deceased, which is described in said application, according to law ; giving the names and residence of the heirs-at-law of said deceased, and alleging that a sale of said property is necessary for a fair and equitable division among said heirs. And thereupon, it is ordered, that the 15th day of February next be set as a day to hear said application ; that J. M. B. Kelly be, and he is hereby, appointed guardian *ad litem* for said

minors ; and that notice of this application, and the day set to hear the same, be given, by posting notices at the court-house door, and three other public places in said county, for three successive weeks before said day."

"February 15, 1864. Upon this, it being the day set to hear and determine the application of James Pynes, administrator of the estate of Sarah M. Johnson, deceased, for the sale of the lands of said deceased, came said administrator, and moved the court to grant his application ; and it appearing to the court that citation herein has been served upon J. M. B. Kelly, guardian *ad litem* of the minor heirs of said deceased, at least ten days before this day, and that notice has been given by posting notices at the court-house door and three other public places in said county, for three successive weeks before this day ; and the allegations of said application being sufficiently proven by the testimony of disinterested persons, taken upon interrogatories, which are filed of record ; and no sufficient objections being made : It is ordered, that said administrator may sell the said lands, after giving notice of the time and place of sale, by posting notices at the court-house door, and three other public places in said county, for at least thirty days, for cash, at Woodville, in said county, and make due return thereof to this court."

"The undersigned, administrator of the estate of Sarah M. Johnson, deceased, reports, that in pursuance of an order of said court, he proceeded, after duly advertising, and sold at Woodville, Ala., on the 29th day of December, 1864, for cash, the house and lot in said town, belonging to said deceased ; and at that same time and place, White Pynes, of said county, became the purchaser of the same, at and for the sum of eighteen hundred and forty dollars, and has paid to him said sum. Wherefore, he prays for an order confirming said sale, and authorizing him to make titles of said land to said purchaser, according to law."

"February 22d, 1865. Upon consideration of the foregoing report, it appearing that said sale was fairly and legally made, and that said land sold for a sum not greatly disproportionate to its real value, and that the purchase-money has been paid : It is ordered that said sale be con-

firmed, and that said administrator be authorized to make titles of said land to said purchaser, according to law. It is further ordered, that said report be recorded and filed."

The record also contains what purports be "interrogatories to be propounded to William Wood and J. M. Bowdon, the answers to which, when taken, are to be read in evidence before said court, upon and in behalf of an application of James Pynes, administrator of Sarah M. Johnson, deceased, to sell lands for division." The interrogatories are these; "1. Are you, or either of you, acquainted with the house and lot in Woodville, belonging to said estate? 2. Are you, or either of you, acquainted with the heirs-at-law of said deceased? If yea, state names, residences, and if any minors or married women. 3. Can a fair, equal, and beneficial division of said lands be made among said heirs without a sale"? Beneath these interrogatories is copied in the record the following notice: "To the heirs-at-law of said deceased—You will take notice, that after ten days' notice of the foregoing interrogatories, a commission will issue to G. B. Hair, to take the answers of the above-named witnesses, and that within that time you can cross or object to the same, according to law"; which is signed by the probate judge, and beneath it are the following words: "I accept due and legal service of the above interrogatories, waive copy, and consent for commission to issue *instantly*"; signed by J. M. B. Kelly, guardian *ad litem*. The depositions of the witnesses, as set out in the record, are in the following words: "Answers to interrogatories propounded to John M. Bowdon and William Wood. To 1st interrogatory, they answer, 'Yes.' To 2d interrogatory, they answer, 'J. D. Johnson and Charles Johnson.' To 3d interrogatory, they answer, 'No, Charles Johnson is a minor.'"

On the hearing of the application, as appears from the bill of exceptions, the petitioner offered in evidence the record of the proceedings connected with the order of sale, as above set forth, which also contained a citation to J. M. B. Kelly, as guardian *ad litem*; and at the bottom of the citation, as copied, were these words: "I accept due and legal service, waive copy, and consent to act", to which

Kelly's name was subscribed. "The plaintiff introduced said Kelly as a witness, who testified, that he did not in person accept the appointment of guardian *ad litem*; that, to the best of his knowledge and belief, none of the endorsements were in his handwriting; that he recollected nothing of the proceedings for the sale of said land; that the clerk of the probate court, about that time, by his permission, was using his name as guardian *ad litem* generally; that he did not recollect having ever contested a settlement, or an application to sell real estate, in this court; that he thought he would have recollected it if he had done so, but would not swear that he did not act as such. The probate clerk, who was introduced as a witness by the defendant, testified, that a commission was issued to take answers to the interrogatories, but not returned; and that the issue of the commission was evidenced by the fee-book. The defendant admitted that the house and lot was correctly described in the petition, and was the same described in his petition to sell, and was the property of the deceased.

"This being all the evidence", except proof on the part of the petitioner of the value of the house and lot, and of his absence in the army at the time of the sale, "the cause was submitted to the court for decision; and the court thereupon rendered the following decision: 'The court is satisfied, after full investigation of the case, that the administrator acted in good faith. The proceedings as to the sale of the land did not conform strictly to law. The court has doubts as to jurisdiction; consequently, the motion is overruled, and the petition not granted.'" The petitioner reserved an exception to the decision and decree of the court, and he here assigns the same as error.

MARTIN & SAYRE, for appellant.

W. C. OATES, *contra*.

BYRD, J.—Upon legal principle and decisions of this court, a court which has made a final order or decree, which, on the face of the proceedings, is absolutely void, should vacate it whenever its attention is called thereto by an appropriate application for that purpose.—*Stickney v.*

Johnson v. Johnson's Adm'r.

Davis, 17 Pick. 160; *Mobley v. Mobley*, 9 Geo. 247; *Acre v. Ross*, 3 Stew. 288; *Ex parte Sanford*, 5 Ala. 562; *Hood et al. v. Br. Bank Mobile*, 9 Ala. 336; *Moore v. Easley*, 18 Ala. 620; *Thomas v. Dumas*, 30 Ala. 84.

1. We are satisfied that, in this case, the order of sale, on the face of the proceedings, and the sale thereunder, were void.—Pamphlet Acts, 1853–4, p. 55; 9 Ala. 529; 21 Ala. 776; 29 Ala. 510; 30 Ala. 88; 19 Ala. 810.

2. It is eminently appropriate for every court to exercise the power of vacating its judgment or decrees, which are absolutely void on the face of the proceedings; and this, at any time after the rendition. In this case, at least, it is certainly appropriate to do so. The order and sale being wholly void, the court could have proceeded, upon application made as required by law, to order a sale of the land; but, without vacating the previous order and sale, such a cloud would be cast over the title by the first sale, as would tend greatly to diminish the price at the second sale.

If a circuit court has the power, at common law, to vacate at a subsequent term a judgment rendered in favor of a plaintiff, or against a defendant, who was dead at its rendition, or any other void judgment, we can conceive no sound reason why the probate court, though one of limited jurisdiction, could not vacate a decree rendered in favor of, or against, a party dead at the time of its rendition, or any other void decree or final order. This power is one which pertains to all courts, as well to a justice of the peace, as to the supreme court of the United States.—*Ex parte Crenshaw*, 15 Peters' U. S. Rep. 119; *Huntington v. Finch*, 3 Ohio, (N. S.) 445; *Dicks v. Hatch*, 10 Iowa, 380; and other authorities cited *supra*; *Pratt et al. v. Keils et al.*, 28 Ala. 396.

Such a rule is not applicable to decrees and judgments which are voidable; and whenever it is asserted that a court of law has no authority to vacate a judgment, after the expiration of the term at which it was rendered, (as in the case of *Kidd v. McMillan*, 21 Ala. 325,) it evidently refers to judgments which are voidable only, and not such as are wholly void. The true rule seems to be, that any court should, on a proper application, vacate any final

order, decree, or judgment, at any time subsequent to its rendition, if the same is void on the face of the proceedings and record; but not where it appears to be void from facts *dehors* the record, except in the case of the death of either party to the suit or proceeding, at the time the judgment or decree is rendered, and in such other cases as may be authorized by long practice, or by statute.

The order of the court below, overruling appellant's motion, and refusing to grant his petition, is reversed, and the cause remanded for further proceedings in conformity to this opinion.

WHITE *vs.* HUTCHINGS.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Proof of ancient deed.*—A deed, more than thirty years old, and unblemished by alterations, is admissible in evidence without proof of execution, the subscribing witnesses being presumed to be dead; and its admissibility does not depend on the sufficiency of the certificate of its acknowledgment.
2. *Presumption of proof or acknowledgment of deed from lapse of time; admissibility of record copy.*—After the lapse of twenty years, it will be presumed that a deed, which is shown to have been recorded in the proper office, and in the proper county, was legally proved or acknowledged, and that the proper certificate of its proof or acknowledgment was written on or under it; and a transcript from the record, in such case, will be admissible evidence, (Code, § 1275,) when the facts in proof raise the presumption that the original deed, if not lost or destroyed, is not in the custody, or under the control, of the party who offers the evidence. (*Per* JUDGE, J.)

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JNO. GILL SHORTER.

THIS action was brought by Mrs Elizabeth White, against Stephen Hutchings, to recover a lot in the city of Montgomery, which is described in the deed hereinafter copied.

Pending the appeal in this court, the transcript was lost, and a *certiorari* was awarded to bring up a new record; and the original papers in the court below, except the bill of exceptions, having also been lost, the following agreement, between the counsel of the respective parties, was entered of record in this court: "It is agreed in this cause, that the suit was brought in the circuit court of Montgomery, according the form prescribed in the Code, to recover possession of the realty in the bill of exceptions specified. It is further agreed, that the cause be submitted on the case made by the bill of exceptions, and that all defects of the record be waived."

The bill of exceptions is in the following words:

"On the trial of this cause, it was admitted by the defendant, that John Falconer was the original patentee of the lot sued for, by patent from the United States; and that the transcript of the deed, with the certificate and endorsement, was a true and correct transcript from the record of deeds in the probate court of Montgomery, the county in which the lot was situated; as follows, to-wit:

"Know all men, by these presents, that I, John Falconer, of the town and county of Montgomery, State of Alabama, for and in consideration of two hundred dollars, to me in hand paid by William Maguire, of the same town, (the receipt whereof I do hereby acknowledge,) do hereby give, grant, sell, enfeoff, and convey, unto the said Maguire, the two following described lots, situated in that part of said town formerly called Philadelphia, to-wit: lot number ten, on the north side of Monroe street, measuring fifty feet in front, and one hundred and ten feet in rear, and lot number eleven, next east, and adjoining the same, measuring fifty feet front, and one hundred and sixty feet in the rear, with all the privileges and appurtenances belonging to said lots, according to the last plat of said town; to have and to hold the afore-granted premises, to the said Maguire, his heirs, and assigns, to their use and behoof forever. And I do covenant with the said Maguire, his heirs, and assigns, that I am lawfully seized in fee of the afore-granted premises; that they are free from all incumbrances; that I have a good right to sell and convey the

same to the said Maguire; and that I will warrant and defend the premises, to the said Maguire, his heirs, and assigns, forever, against the lawful claims and demands of all persons. In witness whereof, I, the said John Falconer, have hereunto set my hand and seal, this 29th day of August, in the year of our Lord one thousand eight hundred and twenty-five.

“JOHN FALCONER.”

“‘Signed, sealed, and delivered, in presence of Andrew J. May and Robert Hobdy.’

“‘Montgomery, Ala., 27th September, 1825, then the above-named John Falconer the above instrument to be his free act and deed, before me.

“‘G. H. GIBBS, C. C. M. C.’

“It was further admitted by the defendant, and agreed, that the said copy of said instrument, with the certificate and endorsement thereon, might be regarded, for the purposes for which it was offered, as if a paper of the same tenor and effect, and purporting to be the deed of John Falconer to William Maguire, with the copy as set forth in said transcript, and the certificates and endorsements as therein set forth; and that said certificates and endorsements were in the handwriting of G. H. Gibbs, clerk of the circuit court of said county on the 27th day of September, 1825, had been offered in evidence by the plaintiff. With these admissions and agreements, plaintiff offered said transcript in evidence, as evidence, by force of the certificate and endorsements, of the execution of the deed by John Falconer at the time the same bears date; stating that she expected to connect herself with said deed and title of said Maguire. The defendant objected to the certificate being received, as evidence of the execution of the instrument at its date, as specified in said transcript. This objection was sustained by the court, and the evidence rejected; to which ruling of the court the plaintiff excepted. The plaintiff then offered said certificate, with said copy of said deed, with the admissions and agreements aforesaid, as evidence of the execution of the deed at the date of the certificate; stating that she expected to connect her title

with said deed to Maguire. To the introduction of this, as evidence of the execution of the deed at the date of the certificate, the defendant objected; which objection the court sustained, and would not permit the evidence to go to the jury; to which ruling of the court the plaintiff excepted”.

In consequence of the rulings of the court on the evidence, as above stated, the plaintiff took a non-suit; which she here moves to set aside, and assigns as error the rulings of the court to which she reserved exceptions.

JNO. A. ELMORE, and W. P. CHILTON, for the appellant, cited 1 Greenl. Ev. §§ 21, 144, and authorities referred to in notes; *Gantt's Adm'r v. Phillips*, 23 Ala. 275; *Lay v. Lawson*, 23 Ala. 377; *Barnett v. Tarrence*, 23 Ala. 463; *McArthur v. Carrie's Adm'r*, 32 Ala. 75.

GOLDTHWAITE, RICE & SEMPLÉ, *contra*, cited the following authorities: *Fipps v. McGehee*, 5 Porter, 413, 434; *Bradford v. Dawson & Campbell*, 2 Ala. 203; *Ravisies v. Alston*, 5 Ala. 297; *Hobson v. Kissam & Co.*, 8 Ala. 357-62; *Shelton v. Armor*, 13 Ala. 647; *Herbert v. Hanrick*, 16 Ala. 581-99.

JUDGE, J.—The transcript of the deed from John Falconer to William Maguire was offered in evidence by the plaintiff in the court below, with an agreement between the parties to the effect, that the copy of the deed, as set out in the transcript, might be regarded as an original paper of the same tenor and date; and that the certificate and endorsements thereon, as shown by the transcript, might be regarded as in the handwriting of G. H. Gibbs, who was, at the date thereof, the clerk of the circuit court for Montgomery county. This presents the question, whether the deed, as specified in the agreement, was properly admissible in evidence, without further proof, it having been relevant to the issue.

If its admissibility had depended upon the sufficiency of the certificate of acknowledgment, the authorities cited by the appellee are conclusive to show that it was properly excluded by the court; for the certificate is, neither in form

nor substance, such as was required by the first section of the act of 1812, which was of force at the time the certificate was made.—Aiken's Digest, 89, § 7. But, nearly thirty-three years had elapsed since the date of the deed; and instruments more than thirty years old, unblemished by alterations, are said to prove themselves, the subscribing witnesses being presumed to be dead; and this presumption, so far as this rule of evidence is concerned, is not affected by proof that the witnesses are living.—1 Greenleaf's Ev. § 21, and authorities cited in note 1 to the text. From this it follows, that the circuit court erred in excluding the evidence.

2. But, under the circumstances, was not the transcript of itself, irrespective of the agreement between the parties, properly admissible in evidence? The bill of exceptions fails to disclose with certainty the date of the admission of the deed to record; but, if it had been recorded in the proper court of the proper county, more than twenty years before the day of trial, the presumption was that its execution had been legally proved, or acknowledged, and that the proper certificate had been "written upon or under the deed." To hold otherwise, would not be in harmony with the repeated adjudications of this court, that after the lapse of twenty years such presumptions may be made.—*Gantt's Adm'r v. Phillips*, 23 Ala. 275; *Lay v. Lawson*, 23 Ala. 377; *Barnett v. Tarrence*, 23 Ala. 463; *Rhodes v. Turner and Wife*, 21 Ala. 210; *McArthur v. Carrie's Alm'r*, 32 Ala. 75; *Milton v. Haden*, 32 Ala. 30; *Wyatt's Adm'r v. Scott*, 33 Ala. 313. To authorize this presumption, it was not necessary, under the weight of authority, first to prove possession or corresponding enjoyment, or other equivalent or explanatory proof.—1 Greenleaf's Ev., note 3 to section 144, and authorities therein cited.

With the presumption, then, that the deed had been legally proved or acknowledged, and properly admitted to record, what was necessary to authorize the transcript to be received in evidence? Section 1275 of the Code declares, that, "if it appears to the court that the original conveyance has been lost or destroyed, or that the party offering the transcript has not the custody or control thereof,

the court must receive a transcript, duly certified, in the place of such original." No direct evidence was offered to the court upon this question; but the evidence springing from the transcript itself, by presumption from lapse of time, was sufficient to show that, if the original deed had not been lost or destroyed, it was, at least, not within the custody or control of the plaintiff. Maguire, the grantee, was the proper custodian of the deed, from the date of its execution. If, subsequent to the conveyance to him, he conveyed the land to another, still the presumption would be, that he retained the possession of the deed from Falconer; and after the lapse of more than thirty years, the plaintiff could not be required to trace up and account for either Maguire or the deed.

In England, all the title-deeds to real estate go with the land to the purchaser; (2 Sugden on Vendors, 90;) and it may be reasonable there to require the purchaser to produce the original deed to a prior grantee. There, no system of registration prevails, and the preservation of the title-deeds, by which the estate has been transferred from hand to hand, becomes of great importance. They are in the nature of heir-looms, and descend, together with the chests in which they are contained, to the heir.—4 Black. Com., book 2, p. 428. But here, the mode of conveying is different. The grantee generally takes only the immediate deed to himself, relying on the covenants of his grantor, who is answerable to him on failure of the title; and on conveying to another, being liable over as *warrantor*, he has the right to retain in his hands the immediate deed to himself, as a protection against claims for the recovery of the property which might afterwards be attempted.—*Eaton v. Campbell*, 7 Pick. 10; *Jackson v. Woolsey*, 11 Johns. 446; *Cocke v. Hunter*, 2 Tenn. Rep. 113; *Nicholson v. Hilliard*, 1 N. C. Law Rep. 253; *Thompson v. Ives*, 11 Ala. 239, and authorities there cited; *Hussey v. Roquemore*, 27 Ala. 281; *Shorter v. Sheppard*, 33 Ala. 648. See, also, *Scott v. Rivers*, 1 Stew. & Port. 19.

My brethren concur in the setting aside of the non-suit on the ground first stated, but announce no conclusion as

to the admissibility of the transcript in evidence on the other grounds discussed in this opinion.

Let the judgment of non-suit be set aside, and the cause remanded.

MAYER *vs.* CLARK.

[STATUTORY TRIAL OF RIGHT OF PROPERTY.]

1. *Admissibility of claim bond, attachment, and levy, as evidence for plaintiff.*
In a statutory trial of the right of property, between a plaintiff in attachment and a claimant who deduces title from the defendant in attachment, there is no error in admitting the claim bond, in which the levy and claim are recited, "as evidence to prove the levy"; nor in the admission of the attachment and its levy, as evidence for the plaintiff.
2. *Admissibility of evidence identifying goods levied on, and showing consideration of plaintiff's debt.*—In such action, though it may be unnecessary for the plaintiff in attachment to prove the identity of the property levied on, the admission of such evidence, at his instance, is not erroneous; nor is there any error in permitting him to prove the notes on which his suit is founded, or their consideration.
3. *Error without injury in admission of irrelevant evidence.*—The admission of irrelevant evidence is not a reversible error, when the record shows that no injury to the appellant resulted from its introduction.
4. *Admissibility of mortgagor's acts or declarations as evidence against mortgagee.*—Where the claimant deduces title under a mortgage or conditional conveyance from the defendant in attachment, the fact that the defendant, after the execution of said mortgage, but before the levy of the attachment, and while he was in possession of the property conveyed, sold a portion of it in the absence of the claimant, is competent evidence for the attaching creditor, as explanatory of the defendant's possession, but not for the purpose of impeaching the *bona fides* of the conveyance to the claimant.
5. *Retention of possession by vendor of chattel.*—The retention of possession by the vendor of a chattel, if unexplained, is *prima-facie* evidence of fraud; but, if explained, and shown to be consistent with good faith, the title passes by the contract notwithstanding such retention of possession.
6. *Dissolution of partnership by consent, and transfer of joint property between partners.*—On the dissolution of a partnership by consent, it is

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competent for the partners to agree that the joint property shall belong to one of them individually; and such contract, if made in good faith, and for a valuable consideration, transfers the entire interest in the partnership property, free from the claims of the partnership creditors.

7. *Rights of partnership creditor.*—A partnership creditor has no lien on the partnership property or assets which he can enforce at law, except by obtaining a judgment and execution; and he has, *it seems*, no lien in equity.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. ROBERT DOUGHERTY.

THE appellee in this case commenced suit by original attachment, on the 13th October, 1856, against John Q. A. and William Lynch, as partners. The attachment was sued out before a justice of the peace, and was made returnable to the circuit court; and it was levied *by a constable*, on the 16th October, on "sixteen sides of leather, thirteen deer-skins, one hundred sides in vats, more or less, twelve cow-hides, four pairs of shoes, and six pairs of shoe-leather." The suit was founded on two promissory notes, executed by said defendants, as partners, and payable to plaintiff: one for one hundred and ninety-two 24-100 dollars, dated the 22d January, 1855, and payable on the 1st January, 1856, on which several credits were endorsed; and the other for the same amount, dated on the same day, but payable on the 1st January, 1857. A claim to the property levied on was interposed by Jacob Mayer, and a claim bond executed, which recited the levy, as above stated, and the interposition of the claim by Mayer. On the trial of the claim suit, at the October term, 1859, as the bill of exceptions shows, the following proceedings were had:

"The plaintiff introduced a witness, who testified that, about the 16th October, 1856, he was working in a tan-yard which was in the possession of John Q. A. Lynch, and on which there were various lots of leather and other property; that one H. C. Jones came to said tan-yard about that time, and levied an attachment, in favor of the plaintiff, and against said defendants, on the property in said tan-yard; that said Jones was then a constable in the precinct in which the tan-yard was situated, and had since died. The plain-

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tiff then handed said witness the attachment on which the suit was founded, and asked him if that was the attachment spoken of by him. The witness then stated, that neither the levy endorsed on the attachment, nor the signature thereto, was in the handwriting of said constable, but both were in the handwriting of said constable's brother. Plaintiff then offered the claim bond, as evidence, to prove the levy of the attachment. The claimant objected to the admission of the bond in evidence for the purpose aforesaid; but the court overruled his objection, and admitted the bond; to which the claimant excepted. The plaintiff then offered to read said attachment and levy in evidence, without further proof thereof; to each of which, separately, the claimant objected; each of which objections was overruled by the court, and said attachment and levy were read in evidence; to which rulings of the court the claimant excepted. The plaintiff then offered to prove, by said witness, that the attachment first spoken of by him was levied upon the same articles enumerated in said levy; to which the claimant objected; but the court overruled his objection, and permitted said proof to be made; to which the claimant excepted.

"The plaintiff offered in evidence, after having proved the execution thereof, two promissory notes, which were in the words and figures following," (setting them out,) "and his attorney stated, when offering them, that they were the notes on which the attachment was sued out; but there was no evidence of that fact, except what appears on the face of the notes and the attachment; and said attorney stated, that he offered them as the claims on which the attachment was sued out, and to show the dates at which said debts were contracted, and also offered them in connection with the evidence of the consideration on which they were given, which he said he would afterwards introduce. The claimant objected to the admission of said notes in evidence, but the court overruled his objection, and admitted them; to which, also, the claimant excepted. The plaintiff then offered to prove the consideration of said notes; to which the claimant objected; but the court overruled the objection, and he excepted.

“The plaintiff then proved, that he was the owner of the said tan-yard, and had rented it, previous to 1855, to one Arledge, who owed him for the rent; that the defendants in attachment bought out the interest of Arledge in said tan-yard, and, in part payment therefor, agreed to give plaintiff their notes for what said Arledge owed; and that they executed said notes for this consideration. The plaintiff further proved, that said defendants, at the time they purchased the interest of said Arledge in said tan-yard, formed a partnership to carry on the same, under the name and style of J. Q. A. & Wm. Lynch; that as such partners they purchased and took possession of said tan-yard, and carried on the same in the usual way; that said J. Q. A. Lynch lived on the premises, and conducted the business; and that said William Lynch carried on a saddler's shop, and the business of a saddle and harness maker, on his individual account, at a place several miles from the tan-yard, and took no control or active part in the management of the tan-yard. The plaintiff then proved, that said notes were written upon one piece of paper; and that on the same occasion, immediately after they were signed, he interlined between them, with the consent of said defendants, the following words: ‘These notes in consideration of the rent of the tan-yard, which yard is to be its own security.’ The plaintiff then offered to read said interlined words to the jury, they not having been read when the notes were read. The claimant objected to the reading of said words, and to each clause thereof separately; which objections were severally overruled by the court, and the evidence admitted; to which the claimant excepted.

“The evidence showed that the defendants in attachment were once partners in the business of tanning at said yard, but that said William Lynch went out of the business several months before the 22d September, 1856; but there was no evidence showing that there had been any settlement of said partnership, and none showing that there had not been such settlement. The evidence further showed, that after said William Lynch went out of said business, said J. Q. A. Lynch continued in the sole occupation of the tan-yard, and carried on the business in his own name, and claimed

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and controlled the same as his own ; and that on the 22d September, 1856, he executed and delivered to the claimant the following instrument :

“State of Alabama, } “Know all men, by these pres-
 Wilcox county. } ents, that I have this day sold unto
 Jacob Mayer all my interest in the leather, shoes, stock,
 and tools, at the tan-yard at Lower Peach-tree, consisting
 of about one hundred and twenty-five sides of leather, six
 pairs of ready-made shoes, twenty-three pairs of sole-leath-
 ers, five deer-skins, for the amount of one hundred and fifty
 dollars; which amount is to be credited on certain notes
 and accounts, which said Jacob Mayer holds against the
 undersigned, J. Q. A. Lynch. John A. Q. Lynch shall have
 the right to work the stock of leather into shoes for the said
 J. Mayer, and the said J. Mayer shall allow him regular
 prices for the shoes, and in this way let him redeem the
 above-described stock, which he has this day sold to him,
 or until he has paid the full amount that he is indebted to
 said J. Mayer. September 22, 1856.

“Attest: A. J. Arledge.”

“JOHN Q. A. LYNCH.”

Appended to this instrument of writing, is the certificate of a justice of the peace, stating that its execution was acknowledged before him on the 25th October, 1856 ; and a memorandum by the probate judge, that it was filed for record in his office on the 6th November, 1856, and was recorded. “The evidence showed, also, that said J. Q. A. Lynch was in possession of the property described in said mortgage at the time he executed the same, claiming it as his own ; and that he continued in possession thereof afterwards under said mortgage, claiming the property as belonging to said Mayer, until the 16th October, 1856, when said attachment was levied on the property. The evidence showed, also, that the subscribing witness to said mortgage informed said plaintiff, more than a month before the levy of said attachment, that said John Q. A. had transferred said property to said Mayer, to secure debts which he owed him, but stated nothing further as to the character of the transaction. The plaintiff offered to prove, that said J. Q. A. Lynch, after the making of said mortgage, and before the levy of said attachment, sold a portion of the property

embraced in said mortgage, in the absence of the claimant, to him, the plaintiff; stating, at the same time, that he offered this evidence in rebuttal of the evidence offered by the claimant, that said J. Q. A. Lynch did not claim said property as his own after the mortgage was made. To this evidence the claimant objected; but the court overruled his objection, and decided that the evidence was admissible for the purpose of rebutting, and also as a circumstance to show the bad faith of the mortgage transaction between the claimant and said J. Q. A. Lynch, and admitted the evidence for both purposes; to which the claimant excepted. The plaintiff then made the proof above offered, and also proved that the property so sold consisted of a lot of shoes, and that the price thereof was, by consent of the said J. Q. A. Lynch, credited on his said notes. On cross-examination of the witness who proved these facts, the claimant asked him if he did not, at or immediately before said sale, advise said John Q. A. to sell said lot of shoes to plaintiff; to which question the plaintiff objected. The court sustained the objection, and refused to allow the witness to answer the question; to which the claimant excepted.

“The evidence further showed, that during the years 1853, 1854, 1855, and the early part of the year 1856, and before the date of said mortgage, said John Q. A. and William Lynch as partners, and said John Q. A. individually, were indebted to the claimant for board, goods sold, &c.; and that for all of said indebtedness which accrued before the year 1856, two notes of said John Q. A. were taken, which are in the words and figures following.” (By some mistake of the clerk, the notes on which the attachment was sued out are here copied in the transcript, instead of the notes payable to the claimant.) “The evidence showed, also, that these notes embraced both partnership debts due by said firm, and individual debts due by said John Q. A. Lynch; but it was not shown what part was due for individual debts, and what part for partnership debts; also, that the individual indebtedness of said John Q. A. for the year 1856, up to the date of the mortgage, amounted to about eighty-three dollars, and that said mortgage was given to secure all of said indebtedness. The separate

value of each article levied on, and in controversy in this case, was also shown. This being all the evidence in the case, the claimant made separate motions, after the evidence was closed, to exclude each portion of the evidence which, as above stated, had been admitted by the court against his objections; which several motions were overruled by the court, and the claimant excepted.

“The court charged the jury—1st, that in contests between mortgagees and creditors of the mortgagors, possession by the mortgagor, after the law-day of the mortgage, was presumed by the law to be fraudulent; 2d, that if they found, from the evidence, that there was no law-day in the mortgage to the claimant in this case, and that John Q. A. Lynch, the mortgagor, remained in possession of the property after the making of the mortgage, then said mortgage was, in legal presumption, fraudulent and void as to the creditors of said Lynch. To each of these charges the claimant excepted. In connection with said charges, the court also told the jury, that the presumption of fraud would be rebutted, if the claimant showed by the evidence that the transaction was *bona fide*, and upon a full and fair consideration.

“3. The court charged the jury, also, that partnership property could not be appropriated to the payment of the individual debts of the partners; and that if they were satisfied, from the evidence, that the notes given in evidence were partnership debts, and that said William Lynch withdrew from the partnership, and that there was no settlement of the partnership, and that J. Q. A. Lynch executed the said mortgage to secure the payment of his individual debts to the mortgagee,—then the claimant acquired no such legal title as would prevent the plaintiff from condemning the property levied on in a court of law: that his remedy would be in a court of chancery, where the partnership could be settled,—the partnership effects going to pay partnership debts, and the balance, if any, would belong to the claimant.

“4. The court charged the jury, also, that if they believed, from the evidence, that the debt on which the plaintiff's attachment is founded, was a partnership debt against J.

Q. A. & W. Lynch, and that the property levied on belonged to said partnership, then John Q. A. Lynch, one of the partners, could not, by his individual mortgage or conveyance, to secure liabilities of his own individually, mixed up with liabilities of the firm, affect the plaintiff's right to subject said partnership property to the payment of his debt against said partnership; and that if they believed the facts aforesaid, then said J. Q. A. Lynch did not have the right to convey said property to the claimant, so as to give him priority in the collection of his claims over the plaintiff in the collection of his by his levy.

"5. The court charged the jury, also, that if the property in controversy ever was partnership property, then the law presumes that it continued to be so, until the contrary is shown.

"The claimant excepted to each of these charges, and requested the court to give the following charges:

"1. 'That the burden of proof rests upon the plaintiff, to show that the property in controversy is subject to his attachment; and that, if they believe, from the evidence, that the only proof showing property in the defendant in attachment, at the time of its levy, is evidence that at, and shortly before, and after the levy of the attachment, John Q. A. Lynch was alone in possession of the property in controversy, they would not be authorized, from this proof, to infer that the property belonged jointly to the firm of J. Q. A. & Wm. Lynch, but the presumption would be, that the property belonged to John Q. A. Lynch alone.'

"2. 'That if they believed, from the evidence, that William Lynch and John Q. A. Lynch owned the property in controversy as partners, and that William Lynch retired from the partnership before the making of said mortgage to the claimant, and left the property in the possession of John Q. A. Lynch, and that said John Q. A. Lynch afterwards made said mortgage of the property to the claimant, in good faith, and for a valuable consideration, to secure a debt which he owed him; and that the plaintiff afterwards levied the attachment in controversy on said property, under which this claim was interposed,—then the title deduced by the claimant under said mortgage would be

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superior, in a court of law, to the right of the plaintiff to condemn the property under his attachment.'"

The court refused each of these charges, and the claimant excepted to their refusal; and he now assigns as error all the rulings to which, as above stated, he reserved exceptions.

BAINE & NESMITH, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

BYRD, J.—1. The court did not err in permitting the plaintiff to introduce the claim bond of the claimant, "as evidence to prove the levy of the attachment."—*Henderson v. Bank of Montgomery*, 11 Ala 858. Nor in the admission of the attachment and levy thereon, as evidence to the jury. *Lanier v. Br. Bank at Montgomery*, 18 Ala. 627.

2. Nor was there any error in permitting the plaintiff to identify the articles levied on by the attachment, as the same enumerated in the levy; though such identification may have been unnecessary. We cannot see how such proof could have prejudiced the claimant.—*Borland v. Mayo*, 8 Ala. 111. Upon the same authority, there was no error in the introduction of the notes due the plaintiff from the defendant in the attachment suit, nor in the proof of the consideration of the notes. It would have been clearly admissible in rebuttal.

3. Upon the same principle, there was no error in permitting the plaintiff to prove and read to the jury the interlineation made after the execution of the notes, but made immediately thereafter, by the consent of the makers. See, also, *Yarborough v. Moss*, 9 Ala. 389; *Parsons v. Boyd*, 20 Ala. 121; *Frierson v. Frierson*, 21 Ala. 555; *Seabury v. Stewart & Easton*, 22 Ala. 220; *Kyle v. Mayes*, 22 Ala. 694; *Bishop v. Blair*, 36 Ala. 85; *Jemison v. Smith*, 37 Ala. 185.

It may appear difficult to reconcile these cases with the doctrine laid down in 1 Green. Ev. § 52, and the following cases: *Perry v. Graham*, 18 Ala. 824; *Lane v. Taliaferro*, 23 Ala. 376; *Mobile Man. Co. v. McMillan & Son*, 31 Ala. 722; *City Council of Montgomery v. Gilmer*, 33 Ala. 132; and especially the cases of *Borland v. Mayo*, and *Taliaferro*

v. Lane, supra. Whether they are reconcilable, we will not decide; but hold that the cases first cited announce principles which are applicable to this case. The latter cases seem to hold, that the introduction of irrelevant testimony is a reversible error. The former hold, that it is a reversible error, *unless* it clearly appears from the record that the jury was not misled, or some injury did not result to the party objecting. The court should always exclude irrelevant testimony, and keep the parties to the issue.

4. The court very properly permitted the plaintiff to prove, by way of rebuttal, and as explanatory of the possession of John Q. A. Lynch, that after the making of the supposed mortgage, and before the levy, he sold a portion of the property in the mortgage, in the absence of the claimant.—*Nelson v. Iverson*, 24 Ala. 16; *Price v. Br. Bank at Decatur*, 17 Ala. 376; *Upson v. Raiford*, 29 Ala. 188. We do not decide that the instrument was a mortgage, and only call it so for convenience.

But, although the plaintiff offered said act for the purpose indicated, yet the court gave it a different direction and influence, “as a circumstance to show the bad faith of the mortgage transaction between claimant and said John Q. A. Lynch”; and in doing this, the court below departed from the authority of decisions made by this court, in the cases of *Price v. Br. Bank at Decatur, supra*; *Thompson v. Mawhinner*, 17 Ala. 366; *Newcombe v. Leavitt*, 22 Ala. 641; *Foote and Wife v. Cobb*, 18 Ala. 588; *Perry v. Graham*, 18 Ala. 824. The rule seems to be well established, that such acts of a donor or grantor in possession are admissible to show the character of his possession, but not to attack the *bona fides* of a conveyance made by him of property in his possession.

The court refused to allow the claimant to ask witness if he did not advise said John Q. A. Lynch to sell said lot of shoes to the plaintiff, at or immediately before the sale. Suppose that the witness had answered affirmatively; how could that have affected the rights of the parties, or rebutted the effect of the evidence as to the character of the possession of Lynch? We can not see in what way it could have tended to explain the possession; and though it

might have tended to explain the sale, as an act impeaching the *bona fides* of the conveyance from Lynch to claimant, yet, as the proof of the sale has been held to have been improperly admitted for that purpose, it is unnecessary to say more on this question.

This disposes of all questions arising during the trial on the admission and exclusion of testimony.

5. Where the possession of a chattel remains with the vendor, it is, as to creditors, a badge of fraud simply, and not fraud *per se*.—*Hobbs v. Bibb*, 2 Stew. 54–336; 5 Ala. 531, 780; 14 Ala. 814; 24 Ala. 219. Possession remaining with the vendor, unexplained, is, *prima facie*, evidence of fraud; and if consistent with good faith and the absolute disposition of property, and the transaction is *bona fide* throughout, then the title passes by the contract of sale, notwithstanding the possession remains with the vendor. *Millard's Adm'rs v. Hall*, *supra*, and the cases therein cited.

The first charge of the court, and the second, too broadly lay down the law, when applied to the evidence, and when tested by the principles laid down in the cases of *Hobbs v. Bibb*, *supra*, (which is very much in point,) and the case of *P. & M. Bank of Mobile v. Borland*, 5 Ala. 539. The latter case is explanatory of the rule laid down in the former; and we recognize it as laying down the true rule. But the error in the first and second charges was cured by the instruction given to the jury in connection with them. The true rule would seem to be, that possession of personal property after a sale, remaining with the vendor, is a badge of fraud, which, if unexplained, would be sufficient to authorize a verdict against the vendee. But, if explained, as required in the case of the *Bank v. Borland*, then the title of the vendee will not be affected by the possession of the vendor. Testing the second charge with the qualification by these rules, we cannot say that the court erred. It in effect conforms with the principles established by these cases; though, in saying upon the facts hypothetically stated, that “the mortgage was, in legal presumption, fraudulent and void as to the creditors of Lynch”, it is too strong; but it was neutralized by instructing the jury, in connection therewith, “that the presumption of fraud would

be rebutted by Mayer showing by the evidence that the transaction was *bona fide*, and upon a full and fair consideration." This qualification was more favorable to the vendee than the rule laid down in *Borland's* case, and *Upson v. Raiford*, 29 Ala. 194.

6. Instead of passing severally on each of the other charges given, and those refused, we will proceed to state principles which will serve to aid the parties and the court in arriving at a just decision of the matter in controversy.

Upon the dissolution of a partnership, it is lawful for the partners, in cases of a dissolution by consent, to agree that the partnership property shall belong to one of them; and if the same is *bona fide*, and the agreement is for a valuable consideration, it will transfer the entire property to such partner, wholly free from the claims of the joint creditors. Gow on Partnership, ch. 5, § 2, pp. 237-40, 3 ed.; Collyer on Partnership, b. 2, ch. 1. § 2, pp. 113-4, 2 ed.; 1 Mad. 346; 10 Vesey, 347; 2 Swans. 575.

7. A partnership creditor has no lien on partnership property, which he can enforce at law, except by obtaining judgment and execution thereon; and it *seems* that he has no lien in equity.—Story on Partnership, § 97; *Ex parte Bufford*, 6 Vesey, 119-26, where the subject is fully discussed by Lord Eldon; and also in Story on Partnership, ch. 15. The cases of *Burwell et al. v. Springfield*, (15 Ala. 273,) and *Nall et al. v. McIntyre*, (31 Ala. 533,) are not in conflict with the above. Nor is it inconsistent with the rule of the administration of partnership effects, which gives a priority to partnership, over individual creditors.—*Emanuel v. Bird's Adm'r*, 19 Ala. 603.

For the error pointed out in the opinion, let the judgment be reversed, and the cause remanded.

JUDGE, J., did not sit in this case, having been of counsel in the court below.

JARRELL vs. LILLIE.

[ACTION ON PROMISSORY NOTES AND ACCOUNTS.]

1. *Plea denying plaintiff's ownership.*—The rule of practice adopted at the January term, 1853, which provides that, in an action “by any transferee, assignee, or endorsee, the plaintiff shall not be required to prove his interest in the cause of action, unless the same is put in issue by plea verified by affidavit,” does not change any rule of evidence, nor relieve the plaintiff, when such sworn plea is filed, from the necessity of proving his cause of action as before.
2. *Possession as proof of ownership.*—Possession is *prima-facie* evidence of ownership; but possession of a note by an attorney, as such, is not sufficient to authorize a recovery by him in his own name.
3. *Charge on sufficiency of evidence.*—In an action by the transferee or assignee of a promissory note and open account, the plaintiff's ownership of the cause of action being put in issue by plea verified by affidavit, it is error to instruct the jury, “that if the evidence between the parties was equally balanced, they must find for the plaintiff.”

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Jehiel Lillie, against E. C. Jarrell, and was commenced on the 24th August, 1859. The cause of action, as set out in the complaint, consisted of a promissory note executed by the defendant, dated the 9th September, 1850, and payable on the 25th December, 1851, to John Godey or bearer; another note dated the 29th October, 1850, and payable on the 1st January, 1851, to H. G. Johnson or bearer; an account for goods sold and delivered, due on the 25th December, 1850, in favor of W. R. Cozart; and an account stated between said Cozart and the defendant on the 25th December, 1850; and the complaint averred that the plaintiff was “the real owner of said notes and accounts.” The defendant pleaded—1st, that the plaintiff was not the owner of the notes and accounts declared on; 2d, the general issue; 3d, the statute of limitations; and the first plea was duly verified by affidavit

The plaintiff took issue on the first and second pleas, and replied to the third, that the notes were executed in Georgia, and that the defendant had not resided in this State six years before the commencement of the suit.

"On the trial," as the bill of exceptions states, "the defendant, to prove his first plea, puts the plaintiff on the stand as a witness, who proves that, in the summer of 1859, and before the commencement of this suit, he, as the attorney of the parties, commenced suit in a justice's court in said county, in the name of the payees of said notes; and that he afterwards dismissed said suit, and commenced this suit in his own name. This being all the proof bearing on said issue, the court charged the jury, that the possession of said notes was *prima-facie* evidence of ownership; and that they must find for the plaintiff, unless such proof was rebutted by proof on the part of the defendant; and further, that if, on said issue, the evidence on the part of the plaintiff and defendant was equally balanced, then they must find for the plaintiff; to each of which charges, as above set forth, the defendant excepted. The plea of the statute of limitations, and the general issue, were disposed of without any objection on the part of the defendant."

The charge of the court is now assigned as error.

L. F. MCCOY, for appellant.

W. P. CHILTON, *contra*.

BYRD, J.—The rule of practice adopted at the January term, 1853, (31 Ala. p. v,) does not change any rule of evidence, or impose upon the plaintiff any greater or less burden of proof when the plea is verified as required by the rule. Its effect is, merely to require the plea "*to be verified by affidavit*" in the particular cases referred to in the rule, and to relieve the plaintiff from the proof of title, if this is not done. It leaves the sufficiency of the proof to establish the interest of the plaintiff in the cause of action to be ascertained by the same principles which were applicable before the adoption of the rule.

2. Possession is *prima-facie* evidence of title or interest

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in the party having the possession.—*Ala. & Miss. R. R. Co. v. Sanford & Reid*, 36 Ala. 708; 17 Ala. 211, 566; 23 Ala. 626. But possession as an attorney, would not authorize a suit and recovery in the name of the attorney.

3. All the evidence given on the issue joined on the first plea is set out in the record. Whether the word "issue" in the second charge refers to the issue joined on the first plea, or to the first charge of the court, still the second charge, which directs the jury that, "if on said issue the evidence on the part of the plaintiff and defendant was equally balanced, they must find for the plaintiff," is erroneous. In the case of *May's Adm'r v. Williams*, (27 Ala. 272,) the court say: "We think that the court laid down the law too broadly, when it instructed the jury that, in civil cases, they were bound to find according to the preponderance of the testimony. Whatever facts are necessary to be established, whether by the plaintiff to give him the right to recover, or by the defendant to sustain his defense, must be proved; and although, from the nature of things, it is impossible to say what degree or quantity of evidence amounts to proof, as it must necessarily depend upon the effect it has upon the mind, yet it will scarcely be denied that it would be unjust to charge a defendant with a heavy debt, when the preponderance of the evidence merely inclined the minds of the jury to the side of the plaintiff."

If a preponderance in favor of the plaintiff will not authorize a verdict in his favor, by no rule of law can he be entitled to one when the evidence is equally balanced. Even if the court referred by the words "said issue" to the rebutting evidence of the defendant to the proof of possession by plaintiff of the notes sued on, and the defendant rebuts that proof by evidence which equally balances that of plaintiff; still, in such a case, the court should not charge the jury that they must find for the plaintiff.—1 Ala. 203; 15 Ala. 468. When the burden of proof is on the plaintiff, as to *any fact which is necessary* for him to prove, to entitle him to recover, so long as the evidence is equally balanced as to the existence of that fact, the plaintiff is not entitled to recover, whether the fact is one of agency, possession, ownership, title, bail-

ment, or otherwise. In any such case, an equilibrium of proof does not entitle plaintiff to a recovery; and a preponderance may or may not.—27 Ala. 272; 15 Ala. 468. The burden of proof, in its legal signification, is never shifted by *evidence*, so as to devolve on the opposite party the necessity of rebutting by preponderating evidence.

Charges, as a general rule, should be based on the conviction the evidence produces on the mind of the jury; and that conviction should be produced after weighing all the evidence before them, not by deciding on the equilibrium or preponderance of evidence. Besides, the evident effect of the charge is to mislead the jury.—13 Ala. 537; 17 Ala. 685, in point; 16 Ala. 53; 1 Ala. 423; 5 Ala. 682; 29 Ala. 200; 21 Ala. 72; 23 Ala. 591; 28 Ala. 606; 22 Ala. 796, 501; 24 Ala. 651; 29 Ala. 188; 28 Ala. 100, 514.

Let the judgment be reversed, and the cause remanded.

ELROD vs. SIMMONS.

[BILL IN EQUITY FOR ACCOUNT.]

1. *Judgment on award; presumption in favor of judgment.*—When a pending chancery suit is submitted to arbitration, and the record shows that the award was read to the court, and that a decree was thereon rendered, but the submission and award are not set out, the appellate court will presume that the decree was authorized by the proceedings under the arbitration.
2. *Sufficiency of award.*—The award in this case, which was founded on a submission of the matters in controversy in a pending suit, was held valid and sufficient under the statute, (Code, §§ 2712, 2716,) on the authority of the cases of *Crook v. Chambers*, (*ante* p. 239,) *King v. Jemison*, (33 Ala. Rep. 499,) and *Tuskaloosa Bridge Company v. Jemison*. (33 Ala. Rep. 476.)
3. *Conclusiveness of statutory award.*—An award which is in substantial compliance with the requisitions of the statute, and which is on its face unobjectionable, can only be impeached by proof of fraud, corruption, or partiality, on the part of the arbitrators, (Code, § 2721,) and cannot be set aside on proof of a mere error of judgment on their part, or other evidence showing that it is unjust.

4. *Judgment on award without supplemental bill.*—When the matters in controversy in a pending chancery suit are submitted to arbitration, and the award is in substantial compliance with the requisitions of the statute, a decree may be entered pursuant to its terms, without a supplemental bill or other formal pleadings.

APPEAL from the Chancery Court at Talladega.

Heard before the Hon. JOHN FOSTER.

THE original bill in this case was filed, on the 7th February, 1857, by Mrs. Angeline Simmons, suing by her next friend and husband, James W. Simmons, against George Elrod, who was her father; and sought an account of the defendant's acts, as agent for the complainant, in the transaction of business relating to the estate of Edward Henry, deceased, who was the complainant's former husband, and of whose estate she was the administratrix. The defendant demurred to the bill, but his demurrer was overruled; and he then filed an answer, which he prayed might also be taken as a cross-bill, and in which he claimed that, on a settlement of all their accounts, a balance would be found in his favor. The complainant filed an answer to the cross-bill, and afterwards, at the January term, 1858, as the minute-entry states, the cause was continued, "being referred to arbitrators." The submission to arbitration, as set out in the record, states and describes the case, and several other cases pending in the circuit court between the parties; and then proceeds as follows:

"Whereas, the parties to the above-named causes are desirous of compromising all matters of difference between them in the cases stated on the other side of this page, and also all other claims and demands for and against each other in every shape and form, whether on bonds, judgments, notes, accounts, or damages; and whereas, the parties have agreed to submit said causes, and all other matters as above stated, to arbitrators, and, to that end, have agreed that John J. Woodward, attorney and solicitor for James W. Simmons and Angeline Simmons, and Lewis E. Parsons, attorney and solicitor for George Elrod, may name three men, if they can mutually agree on them; or, in case they can not agree, that said Woodward and Parsons may

each name one, and the two so named may choose a third, and the persons named and appointed in either of the above ways shall be *endowed* (?) in this paper, and they shall be, and they are hereby, empowered to hear, at such convenient time and place as they may appoint, such evidence as the parties may legally offer them, and make their award in writing; and their award shall be final and conclusive between the parties. And each party promises the other to abide by and perform in good faith the decision and award which may be made by the persons so named as arbitrators; and each party promises to pay the other one thousand dollars, on failure to abide by and perform each and every stipulation contained in this agreement. In witness whereof, the said James W. Simmons and Angeline Simmons, parties of the first, and George Elrod, party of the second part, have hereunto set our hands and seals, this 27th November, 1857."

(Signed by all the parties named, and their seals affixed.)

At the foot of the submission, as copied in the record, is a memorandum signed by said Woodward and Parsons, appointing Hugh G. Barclay, Robert Douglass, and P. D. Simmons, "to act as arbitrators in the foregoing matters." The proceedings had before the arbitrators are next copied in the transcript, showing that they first met on the 12th June, 1858, and, after several continuances, rendered their final award on the 10th August, 1858; the names of the arbitrators being signed to the minutes of each meeting, and to the award. The material portions of these proceedings are as follows:

"We, the above-named arbitrators, have appointed Wednesday, the 23d instant, and the court-house in the town of Talladega, as the time and place for hearing and considering the matters mentioned in the above agreement, and making our award in the premises; which is to be continued from day to day till disposed of; of all which the parties have had the notice required by law."

"Talladega, Alabama, June 23d, A. D. 1858. We, H. G. Barclay, Robert Douglass, and P. D. Simmons, as arbitrators chosen by George Elrod and James W. Simmons and his wife, Angeline Simmons, and their attorneys, to hear and

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determine matters of dispute now pending as suits in the circuit and chancery courts in Talladega county, Alabama, met at the above-stated time and place, according to our own appointment and the agreement of the parties; and, after being duly qualified as the statute in such cases directs, by taking upon ourselves an oath, administered to each other, that we would hear and impartially determine the matters submitted to us, according to the evidence and the manifest justice and evidence of the case, to the best of our judgment, without favor or affection; the case being called, the parties, by their attorneys, appeared; and on application of James W. and Angeline Simmons it was continued, and we adjourned to meet again on the 27th day of July next."

"We, the undersigned, arbitrators, to whom was referred the case of James W. Simmons *vs.* George Elrod, pending in the circuit court, for abduction and harboring the plaintiff's wife; the case of James W. Simmons *vs.* George Elrod, pending in the circuit court, for the detention of certain negroes, &c.; the case of Angeline Simmons, by her next friend James W. Simmons, pending in the chancery court, for account, and on cross-bill by Elrod in same case; the two cases of George Elrod *vs.* James W. and Angeline Simmons and Angeline Simmons, pending in the circuit court, by motion for money paid by Elrod as security of the Simmons's; and the case of George Elrod *vs.* James W. Simmons, pending in the circuit court, by appeal from justice's court, for oats; also all other claims and demands between said parties, in every shape and form,—having had the said several causes under consideration, after hearing the proof and argument thereon, we render the following award: 1st. In the case of James W. Simmons *vs.* George Elrod, for abduction, we award *five* dollars damages in favor of the plaintiff *vs.* defendant Elrod, and the costs, which we have settled upon and allowed, as shown by exhibits marked A and B in the cause, and such other costs in the case as the clerk may find not to have been taxed; all which costs is also adjudged against the defendant Elrod. 2d. In the case of James W. Simmons *vs.* George Elrod, for detention of slaves, &c., we award judgment in favor of the defendant,

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and that plaintiff pay the cost allowed by us in this case, as shown by exhibits marked C and D, and such other costs as may not have been taxed, to be taxed by the clerk. 3d. In the case of James W. and Angeline Simmons *vs.* George Elrod, in the chancery court, and Elrod *vs.* said Simmons, on cross-bill in said court, and the two cases in the circuit court in favor of Elrod *vs.* the said Simmons's, pending by motion for money paid by Elrod as security for James W. and Angeline Simmons and Angeline Simmons, have been consolidated by us, and treated as one case in the award which we make, viz.: We award Angeline Simmons judgment against George Elrod, for the sum of *three hundred and sixteen* 18-100 dollars, together with the sum of thirty-three dollars and five cents costs in the chancery suits, *and one hundred and thirty-three* 65-100 dollars costs in one of the motion cases, as shown by exhibit E, and six and 70-100 dollars costs in the other motion case, as shown by exhibit F, and twenty-three and 85-100 dollars costs which has accrued before us as arbitrators in the said chancery and motion cases, as shown by exhibit G, together with such other and further costs, to be taxed by the respective clerks of said courts in said several causes, which have not been taxed. 4th. In the case of George Elrod *vs.* James W. Simmons, pending by appeal in the circuit court, we award judgment in favor of Elrod, against said Simmons, for *one* dollar, together with the costs, \$25 20, accrued in said circuit court, and \$34 90 costs, accrued before us in this case, as shown by exhibits marked H and I. The several exhibits above referred to are part of this award, to show the interests therein charged. We find the costs of arbitration in the several foregoing causes, in addition to what has heretofore been allowed and settled upon, is the sum of sixty-five dollars, as shown by exhibit K, and of this costs we award that each party pay one-half; James W. and Angeline Simmons constituting one party, and George Elrod the other party. We further award, that if Elrod shall pay the whole of this last mentioned cost, he shall have credit for thirty-two 50-100 dollars on the amount due by him to said Simmons and wife, as found by this award. If the said James W. and Angeline Simmons shall pay the

whole amount of this latter mentioned cost, then judgment against said Elrod shall be increased against him to the amount of thirty-two 50-100 dollars. All which is respectfully submitted for the action of the Talladega chancery and circuit courts. August 10 1858."

At the foot of the award is a memorandum, signed by the attorneys of both the parties, and dated the 10th August, 1858, in these words: "We waive copy of this award, and all further notice of the same." The award was filed in the circuit court on the day of its rendition. At the January term, 1860, of the chancery court, as the minute-entry states, "the award of the arbitrators was read, and ordered to lie over one day." The deposition of one Kennedy was taken by the defendant, who testified in reference to some of the items of indebtedness embraced in the arbitration. At the February term, 1861, "leave was given to open the deposition of Kennedy, the testimony was offered, and held for consideration in vacation"; and the chancellor thereupon rendered the following decree: "This cause coming on to be further heard, on the award of the arbitrators made to a former term, it is thereupon ordered, adjudged, and decreed, that the complainant recover of the defendant the sum of three hundred and sixteen 18-100 dollars, and that the defendant pay the sum of thirty-three 05-100 dollars, costs of this suit; for which execution may issue."

The chancellor's decree is now assigned as error, and the appellant also submits a motion to strike from the record all the proceedings connected with the arbitration.

L. E. PARSONS, for appellant.

JOHN HENDERSON, *contra*.

A. J. WALKER, C. J.—A matter of litigation in the chancery court was determined by a decree on the award of arbitrators. The submission and award, together with the minutes of the proceedings before the arbitrators, are copied into the transcript. A motion is made to strike those matters from the record, upon the allegation that they do not belong to the record. If this motion were granted, the appellant who makes it would not be profited;

because the minutes of the court show that the award was read to the court, and that the decree was rendered on it. This being the state of the record, we would be bound to affirm. We must presume, in favor of the decree of the court below, that the submission, proceedings before the arbitrators, and award, were such as to authorize the decree. The point is so decided in *Mobile Bay Road v. Yeind*, 29 Ala. 325.

2. If we look to the copies of the papers connected with the arbitration found in the transcript, the case will be no better for the appellant. We find in those papers nothing which vitiates the award; and it is unquestionably, upon the face of the papers, a good statutory award.—*Crook v. Chambers*, at the present term; *King v. Jemison*, 33 Ala. 499; *Tuskaloosa Bridge Company v. Jemison*, 33 Ala. 476.

3. Being a statutory award, it is final, and cannot be impeached, “unless the arbitrators [were] guilty of fraud, partiality, or corruption.”—Code, § 1721; *Davis v. Forshee*, 34 Ala. 107; *Young v. Leard*, 30 Ala. 371; *King v. Jemison*, *supra*; *Bumpass v. Webb*, 4 Port. 55; *Willingham and Wife v. Harrell*, 36 Ala. 583. We are uninformed as to what evidence was before the arbitrators, and also as to their acts and conduct, except by their award, and the minutes of their proceedings, which are unobjectionable. We could not, therefore, find them guilty of fraud, partiality, or corruption, without indulging an unprecedented and baseless presumption. One witness was examined on the part of the appellant, for the purpose of assailing the award. The utmost tendency of the evidence of that witness was, to show that the judgment of the arbitrators was unjust. A mere error in the decision of the arbitrators, is not a ground for setting aside an award.—*Young v. Leard*, *supra*; *King v. Jemison*, *supra*; *Davis v. Forshee*, *supra*. Allowing, therefore, to the evidence its largest effect, it would be insufficient to justify the setting aside of the award. The court, therefore, did not err in rendering judgment upon it.

4. No formal pleadings are necessary to the rendition of a decree in pursuance of a statutory award; and the decree here is not erroneous, because the award was not brought before the court in a supplemental bill.

The decree is affirmed.

PARISH'S ADM'R vs. BALKUM.

[DETINUE FOR SLAVE.]

1. *Chancery decree under act of 1846, settling property on trustee for married woman; continuance of trustee's title.*—Where a bill in chancery is filed under the provisions of the act approved February 14, 1846, entitled, “An act to protect the rights of married women”; and a decree is therein rendered, by which the wife’s distributive interest in a decedent’s estate is settled upon a trustee, “for her sole and separate use and support, and for the support and maintenance of her family”; the trust does not terminate on the death of the husband, but continues during the life of the wife.
2. *Who is proper party plaintiff.*—An action of detinue for a slave, who was settled by a decree in chancery, under the provisions of the act of 1846, on a trustee, for the “sole and separate use and support” of a married woman, “and for the support and maintenance of her family”; and who, after the death of her husband, and her subsequent marriage, went into the possession of her second husband,—should be brought in the name of the trustee, and not in the name of the second husband.

APPEAL from the Circuit Court of Henry.

Tried before the Hon. J. McCaleb Wiley.

THIS action was brought by Roger Parish, “as trustee for Annis Parish, his wife,” against James W. Balkum, to recover a slave named Edmund, together with damages for his detention; and was commenced on the 23d March, 1861. The plaintiff died in the summer of 1865, and the suit was afterwards revived in the name of John Hutto, as his administrator. “On the trial,” as the bill of exceptions states, “the defendant demurred to the complaint, on the ground, that the suit could not be revived against him in the name of said Hutto, as administrator, because the complaint alleges suit as trustee for Annis Parish, the wife of said Roger Parish, and there is no survivorship in the personal representative.” The court sustained the demurrer, but allowed the plaintiff to amend his complaint by adding the following averments: “which said slave is the separate

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estate of his wife, Annis Parish, and which, by virtue of his marriage with said Annis Parish, he reduced to possession before the detention by the defendant, and which is now in the possession of the said defendant."

The defendant demurred to the amended complaint, "because said suit cannot be revived in the name of said John Hutto, as the personal representative of said deceased plaintiff, because the complaint alleges that said suit is for said slave as the separate estate of his said wife." The court overruled the demurrer, and the defendant then filed nine pleas. The court sustained a demurrer to the second and sixth pleas. The other pleas were—"1st, that this suit could not be revived in the name of the personal representative of said deceased plaintiff, because the suit is for the separate estate of Annis Parish, his wife"; "3d, that upon the death of said Roger Parish, deceased, the said slave vested in Mrs. Annis Parish, and did not become assets of said decedent's estate, which entitled said personal representative to recover either said slave or his hire; 4th, that said Roger Parish was not entitled to sue for and recover said slave at the time the suit was brought; 5th, that at the commencement of this suit, and for many years prior thereto, the said slave vested in Silas Nordon, as trustee, under and by virtue of a decree of the chancery court at Abbeville, rendered at the fall term, 1846; and said defendant held said slave, at the commencement of this suit, under and by virtue of a contract for hiring from said trustee, and therefore plaintiff cannot recover either said slave or his hire;" "7th, that said Roger Parish and Annis Parish were married on the 19th day of January, 1860, and said Annis held and owned said slave, at and after said marriage, as her sole and separate estate; 8th, that at the bringing of this suit, Catherine Ward, Edy Hutto, wife of Martin Hutto, and Ligon Ward, owned an interest in said slaves and their hire, and were not joined in this action; 9th, the general issue, in short by consent." The plaintiff demurred to the seventh plea, and reserved an exception to the overruling of his demurrer; and issue was then joined on all these pleas.

The evidence adduced on the trial showed that the slave

in controversy once belonged to William Norris, who was the father of Mrs. Annis Parish ; that on the 27th October, 1846, the said Annis, then the wife of William Ward, filed a bill in chancery against her husband and the administrators of the estate of her deceased father, for the purpose of having her distributive interest in said estate "secured to her for the benefit of herself and children"; that a decree was rendered in said cause, in November, 1846, by which it was "ordered, adjudged, and decreed, that the complainant's distributive share in the estate of her father, William Norris, deceased, be vested in Silas Nordon, as trustee, for her sole and separate use and support, and for the support and maintenance of her family"; that the slave in controversy was a part of the property secured to said Annis under this decree; that the said William Ward afterwards died, and his widow married said Roger Parish, in January, 1860; that the slave was in the possession of said Roger Parish for some time after said marriage, but ran away from him, and was in the defendant's possession at the commencement of the suit. The court charged the jury, "that the said decree in chancery vested the legal title to said slave in said Silas Nordon, as trustee of Mrs. Ward, now Mrs. Parish; that said decree created a separate estate in her for life, with remainder over to her children; that the death of said William Ward did not terminate the trust; that the legal title was still in Nordon, the trustee; and that on the death of Mrs. Parish, the estate, if any was left, would have to be administered and distributed among her children." The plaintiff excepted to this charge, and he now assigns it as error, together with other matters which require no particular notice.

W. C. OATES, for appellant.

MARTIN & SAYRE, *contra*.

JUDGE, J.—The slave sued for in this case was settled by a decree of the court of chancery, upon a trustee, "for the sole and separate use and support" of Annis Ward, who was at the time the wife of William Ward; and "for the support and maintenance of her family." The bill was filed,

and the decree rendered, under the provisions of "An act to protect the rights of married women," approved the 14th of February, 1846.—Acts, 1845-6, p. 23.

A married woman, for whose use property has been settled under the provisions of this act, has the right, by the terms of the act, "to dispose of any such property, real or personal, by will; and in case of her death without having made such disposition, the same shall be divided and distributed as in other cases of intestacy."

After the decree of the court of chancery was rendered, the husband of Annis Ward died, and she intermarried with Roger Parish, the original plaintiff in this suit, who, after his marriage, and prior to the commencement of the suit, had the slave for some time in his possession. It is contended that, on the death of the first husband of Annis, the trust terminated, and that the legal and equitable estate then became united in her. If this proposition be correct, then, on the intermarriage of Annis with Roger Parish, in January, 1860, the property became her separate estate, under section 1982 of the Code; and in that event, the suit should have been instituted in the name of the wife alone, under section 2131 of the Code, as construed in *Pickens and Wife v. Oliver*, 29 Ala. 528. It is only where no trustee has been appointed for a married woman, in a settlement of property to her sole and separate use, otherwise than by statute, that the husband alone has the right of action, after he has reduced the property to possession.—*Gerald and Wife v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532; *Pickens and Wife v. Oliver*, *supra*.

But, under the provisions of the act of February, 1846, the trust did not terminate on the death of the first husband of Annis. It is clear, we think, that the act contemplates a continuance of the trust, in all cases of a settlement of property under its provisions, during the life of the wife. That this is the proper construction, is made manifest by the power of disposition given to the wife by will; and in case of her death, without having made such disposition, by providing how the property shall be disposed of. Until the event last named occurs, the purposes of the trust are not accomplished. Were we to hold otherwise, we

would add a new limitation, not contemplated by the act, restricting the trust to the period of coverture; and this we have no authority to do.—*Witter v. Dudley*, 36 Ala. 135, and authorities there cited.

If, then, the slave sued for was wrongfully detained, who was the proper person to institute the suit? We think there can be no doubt that Silas Nordon, the trustee, was the proper person. The decree vested the legal title in him, and it was not necessary, as is supposed, that he should have given bond before this part of the decree become operative; the decree made no such requirement. At the time of the commencement of the suit, we are not informed that the trustee had either resigned or been removed; and the objects of the trust not having been at an end, the legal title remained in him, and he alone could have instituted the action.—*Rice v. Burnet*, 1 Spear's Eq. 590: *Schley v. Lyon*, 6 Georgia, 530; *Harley v. Platts*, 6 Rich. L. 315; Hill on Trustees, 236.

Our decision upon this question disposes of the entire case, and renders it unnecessary to notice the other questions presented by the record, and argued by counsel.

Let the judgment be affirmed.

OWENS ET AL. vs. THURMOND'S ADM'R.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Who may contest settlement.*—A creditor of one of the distributees of a decedent's estate has not such an interest in the estate as authorizes him, under section 1812 of the Code, to contest the final settlement of the administrator's accounts and vouchers.

APPEAL from the Probate Court of Henry.

IN the matter of the final settlement of the accounts and vouchers of Charles J. Reynolds, as administrator of James

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Thurmond, deceased. The record contains only a bill of exceptions, which states that, on the day appointed for the settlement, "F. M. Cook and John F. Adams, creditors of said deceased; and Hasting E. Owens, assignee of Teague & Owens, late partners, creditors of one Margaret Thurmond, deceased, widow and heir of said James Thurmond, deceased, whose administrator is the said Charles J. Reynolds; and W. H. Gunn and C. H. Dupont, executors of John G. Green, deceased, judgment creditors of one Wilson Thurmond, who is an heir of said James Thurmond,—came by their attorneys, and moved the court to dismiss the application of said administrator for a final settlement of said estate", and specified several objections to the allowance of the accounts and vouchers. On motion of the administrator, the court dismissed the proceeding at the instance of the intervening creditors, except as to Adams and Cook, holding that the others had no such interest as authorized them to contest the settlement; and this ruling of the court, to which an exception was reserved by said creditors, is now assigned as error.

W. C. OATES, for appellant.

MARTIN & SAYRE, *contra*.

BYRD, J.—Without deciding whether an appeal will lie in such a case is this, (as the point is not raised by the appellee, and the result will be the same as if it were made and sustained,) we are satisfied that the appellants are not persons interested in the settlement of the estate of James Thurmond, deceased, within the meaning of section 1812 of the Code. They are creditors of a distributee of said estate, and their interest is too uncertain and remote to entitle them to appear in their own right to contest the settlement. The creditors of appellants *may* be interested in that settlement remotely, but that certainly does not confer on them the right to contest the settlement of the estate of James Thurmond, deceased.

We are of opinion that the third clause of section 1802 points out who are the parties interested within the meaning of section 1812, both of which apply to solvent estates.

Section 1795 is more general than 1802; but certainly it would not authorize "*any person*" to file the exceptions authorized by that section, unless such person has an *immediate* or *direct* legal or beneficial interest in the estate or the proceeding.

The judgment of the probate court is affirmed.

HICKS vs. BARRETT.

[ACTION ON ADMINISTRATION BOND AGAINST SURETY.]

1. *Statutory action by administrator to recover damages for death of intestate.*
In a statutory action to recover damages for the wrongful act which caused the death of his intestate, (Code, § 1938,) an administrator does not act as the representative of the estate, nor for its benefit; and if he fails in the suit, or recovers less damages than costs, the judgment against him for costs should be *de bonis propriis*, and not *de bonis intestatis*; consequently, the sureties on his administration bond are not liable for his failure to pay such judgment out of the assets of the estate.
2. *Amendment of judgment by correction of clerical misprision.*—When a judgment for costs, against an administrator, is improperly rendered to be levied *de bonis intestatis*, instead of *de bonis propriis*, the error is a mere clerical misprision, which is amendable, and which will be therefore considered as amended.

APPEAL from the Circuit Court of Bibb.

Tried before the Hon. PORTER KING.

THIS action was brought by Walter Barrett, against Isaac M. Hicks, as one of the sureties on the official bond of David Lankford as administrator of Jesse Lankford, deceased; and was commenced on the 15th September, 1859. The complaint set out the condition of the bond, which was in the usual form of an administration bond; and alleged as a breach the failure of the administrator to pay a judgment for costs, which the plaintiff in this action had recovered against him, and which is hereinafter copied. The

defendant pleaded the statute of non-claim, *plene administravit*, and several other special pleas ; but it is unnecessary to state the pleadings at length, or the rulings of the court upon them. The suit in which the judgment for costs was rendered was commenced on the 2d February, 1855, and the judgment was rendered on the 12th October, 1858. The complaint in that suit, and the judgment, were in the following words :

“David Lankford, as the administrator of the estate of Jesse Lankford, deceased, plaintiff, claims of the defendant, Walter Barrett, the sum of three thousand dollars, damages, for a wrongful assault and battery by him, the said defendant, unlawfully committed, with force and arms, upon the body of the said Jesse Lankford in his life-time, to-wit, on the 7th day of August, in the year 1854 ; by means and by reason of which said wrongful act, the death of the said Jesse Lankford was then and there caused. And the said plaintiff avers, that the said Jesse Lankford could have maintained an action against the said defendant for the said wrongful act, had he, the said Jesse Lankford, lived ; and the said plaintiff, as administrator aforesaid, further avers, that the yearly income of the said Jesse Lankford in his life-time was of great value, and amounted to a large sum, to-wit, of the value and amount of three thousand dollars.”

“This day came the parties, by their attorneys, and thereupon came a jury of good and lawful men, to-wit,” &c., “who on their oaths do say, they find the same in favor of the plaintiff, and assess his damages, as such administrator, at the sum of seven dollars. It is therefore considered by the court, that the said plaintiff, as such administrator, recover of the said defendant the said sum of seven dollars, so assessed by the jury as aforesaid, together with the sum of seven dollars of the costs in this behalf expended, for which execution may issue. And it appearing to the satisfaction of the court, that the costs in this behalf expended exceed in amount the sum of seven dollars, it is therefore considered by the court that said Walter Barrett, as such defendant, recover of said David Lankford, as such administrator, of all and singular the goods and chattels, lands and tene-

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ments of Jesse Lankford, deceased, in this behalf expended, over and above the said sum of seven dollars, so to be paid by the said Walter Barrett, to be levied of the goods and chattels, lands and tenements of and belonging to the estate of said Jesse Lankford deceased, in the hands of the said David Lankford as such his administrator; for which let an execution," &c.

The court charged the jury, "that the judgment of said circuit court sued on in this case, and the execution issued thereon, with the sheriff's endorsement thereon of 'no property found,' authorized the plaintiff in this action to recover from the defendant any amount of assets, which the other proof in the cause satisfied their minds had come to the hands of David Lankford as administrator, unless the said administrator had legally and properly disposed of said assets; that the defendant was liable to the plaintiff in this action, for whatever amount of assets the administrator had received, and had not legally disposed of before said judgment was rendered." The defendant excepted to this charge, and he here assigns it as error, together with various other rulings of the court which require no particular notice.

JOHN & CHAPMAN, for appellant.

WM. M. BROOKS, *contra*.

A. J. WALKER, C. J.—Section 1938 of the Code does not, in our opinion, contemplate a suit by an administrator as the representative of an estate. It imposes upon the administrator a trust separate and distinct from the administration. The trust is not for the benefit of the estate, but of the widow, children, or next of kin of the deceased. The administrator fills this trust, but he does not do it in the capacity of representative of the estate. It is altogether distinct from the administration, notwithstanding it is filled by the administrator. No judgment for costs, in a suit under that section, could properly be rendered, to be levied *de bonis intestatis*; and the court erred in rendering such a judgment against the administrator of Lankford's estate. This error is amendable, and will be considered as

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amended.—*Stuart v. Hood*, 10 Ala. 600; *Kennedy v. Young*, 25 Ala. 563; *Savage v. Walsh*, 26 Ala. 619. The judgment is properly *de bonis propriis*.—*Williams v. Hinkle*, 15 Ala. 713. There being no liability on the estate for the costs, the surety on the administration bond is obviously not liable for a failure of the administrator to appropriate the assets to the payment of it.

Reversed and remanded.

BYRD, J., not sitting.

GWIN ET AL. vs. WHITAKER.

[LIBEL IN ADMIRALTY AGAINST STEAMBOAT.]

1. *Rendition of judgment at first term*.—Under section 2698 of the Code, judgment in an admiralty proceeding cannot be rendered at the first term, unless the boat has been seized twenty days prior thereto; and this provision is not repealed or modified by any of the statutes or rules regulating the practice in the courts of Mobile.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THE appellee in this case filed a libel in admiralty against the steamboat *Sumter*, on the 15th day of August, 1865. The boat was seized on the same day, and the appellants intervened as stipulators. On the "third Monday in August, 1865," the court rendered a decree against the stipulators, in favor of the libellant, for the amount of his claim as proved, the decree reciting that the stipulators failed to appear; and its decree is now assigned as error.

ANDERSON & BOND, for appellants.

W. BOYLES, *contra*.

BYRD, J.—The judgment in this case was premature. Code, § 2698. We cannot assent to the conclusion of the attorney for appellee, in his learned argument, that the above section of the Code has been modified or repealed by the statutes and rules of court to which he refers. The other questions having any merit, raised on the record and in the argument of counsel, will not again arise in this case, in the same form as now presented, and we therefore see no necessity for their adjudication.

Let the cause be reversed and remanded.

FOSTER *vs.* HIGHTOWER.

[ACTION ON PROMISSORY NOTE, BY ASSIGNEE AGAINST MAKER.]

1. *Construction of bill of exceptions.*—Where the bill of exceptions, after setting out the evidence and the charge of the court, concludes in the usual form, “and this is signed and sealed as plaintiff’s bill of exceptions,” this is not sufficient to show that an exception was reserved to the charge of the court.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Joshua Hightower, against Charles Foster; was founded on a promissory note executed by the defendant, payable to one Benjamin Jowers, and endorsed by him to the plaintiff; and was commenced on the 7th January, 1858. There is a bill of exceptions in the record, which states the evidence adduced on the trial, and the charge of the court to the jury; but it does not show that any exception was reserved to the rulings of the court on the trial, except as may be inferred from the concluding words, which immediately follow the charge to the jury—“and this is signed and sealed as plaintiff’s bill of exceptions,” &c. The appeal is sued out by the defend-

ant, who assigns as error the charge of the court to the jury.

J. FALKNER, for appellant.

J. T. HEFLIN, *contra*.

BYRD, J.—It does not appear that the defendant excepted to the charge of the court. The words at the conclusion, “and this is signed and sealed as plaintiff’s bill of exceptions,” are not equivalent to an exception, though we might infer that the word “plaintiff’s” is a clerical mistake for “defendant’s.” On the authority of *Milton v. Rowland*, (11 Ala. 732,) *Mahoney v. O’Leary*, (34 Ala. 97,) and other cases decided by this court, the judgment of the court below is affirmed.

GRIFFIN vs. GRIFFIN.

[APPLICATION TO SET ASIDE DECREE ON FINAL SETTLEMENT OF ADMINISTRATOR’S ACCOUNTS.]

1. *Conclusiveness of probate decree*.—A decree of the probate court, rendered on final settlement of an administrator’s accounts, cannot be set aside, at a subsequent term, on account of matters which go behind it.

APPEAL from the Probate Court of Henry.

IN the matter of the petition of Mrs. Sarah J. Griffin, to vacate and set aside a decree which had been rendered against her by said probate court, on final settlement of her accounts and vouchers as administratrix of the estate of Thomas Griffin, deceased. The petition was filed on the 5th February, 1866, and the decree which it sought to set aside was rendered on the 18th December, 1864. The probate court overruled and dismissed the petition, and its decree in that behalf is now assigned as error.

W. C. OATES, for appellant.

JUDGE, J.—In this case, the administratrix applied to the probate court to set aside a decree which had been rendered against her upon the final settlement of the estate of her intestate, more than two years before the date of the application. This action of the court was invoked, mainly, on the ground that she had been erroneously charged on the settlement with the amount of several promissory notes, (assets of the estate,) remaining in her hands uncollected at the time of the settlement.

If the decree of the probate court was *erroneous*, it was not void, and is as conclusive as a decree in chancery, or a judgment of a circuit court; and after the expiration of the term at which it was rendered, the probate court had no power to set it aside, upon grounds which go only to matters behind the decree, although such grounds may be true in point of fact.—*Watson v. Hutto*, 27 Ala. 513, and authorities there cited; especially the case of *Slatter v. Glover*, 14 Ala. 648.

Let the decree of the court below be affirmed.

COX vs. JONES.

[APPLICATION FOR REVOCATION OF APPRENTICESHIP.]

1. *When appeal lies*.—An appeal does not lie from an order of the probate court, dismissing and refusing an application for the revocation of letters of apprenticeship granted by itself under section 1215 of the Code.

APPEAL from the Probate Court of Russell.

IN the matter of the application of Nathan Cox, a freedman, for the revocation of letters (or indentures) of apprenticeship granted by said court to Francis G. Jones over the

petitioner's minor children. The petition was filed on the 8th March, 1866, and alleged that the letters of apprenticeship, under which the defendant held and claimed the right to the possession of the children, were granted without notice to the petitioner, were procured by fraud and misrepresentation on the part of the defendant, and were illegal and invalid in several specified particulars. On the hearing of the petition, the court allowed an amendment of the letters (or order) of apprenticeship, *nunc pro tunc*, by adding the signature of the probate judge, and then dismissed the petitioner's application. The petitioner reserved exceptions to each of these rulings of the court, and he here assigns them as error. A motion to dismiss the appeal was submitted on the part of the appellee.

The petition for the grant of letters of apprenticeship, which was filed on the 27th December, 1865, and the decree founded thereon, are in the following words :

"To the Hon. James F. Waddell, judge of probate for Russell county, in the State of Alabama : Your petitioner, Francis G. Jones, begs leave to state unto your honor, that he is a resident citizen of Russell county, in the State of Alabama, and engaged in the occupation of farming in said county. Your petitioner further states, that he has on his farm, where he now resides, the following negroes who are minors, to-wit," (naming them.) "Nathan and Jenney are the parents of said children, and have been notified of this application. Your petitioner further states, that all of said negro minors are young, and inexperienced, and have no means on which to support themselves, and that their parents are unable to provide a support for them, and cannot support themselves without the assistance of some white person of experience, and unless they are bound out as apprentices will become an expense to the public community, or the county. Your petitioner therefore prays your honor to bind said minors to him as apprentices, and your petitioner will ever pray."

"The State of Alabama, } In Probate Court, Decem-
Russell county. } ber 27th, 1865.

"This may certify, that F. G. Jones having this day made application to have bound to him the following negro

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minors, to-wit," (naming them,) "and the parents of the first seven named having been duly notified, and appearing in court having failed to prove their ability to support and provide for said minors; and the parents of the last five having been notified, and refusing to defend, it is ordered by the court, that said minors be bound to said Jones; the boys until they are twenty-one years of age, and the girls until they are sixteen years of age; and that the bond of said Jones for the performance of this contract, filed as required by this court, be made a matter of record in this office. Given under my hand, this 27th day of December, 1865."

G. D. & G. W. HOOPER, for appellant.

LEWIS & PHILLIPS, *contra*.

BYRD, J.—Appellee makes a motion to dismiss the appeal, and on the authority of the cases of *Guilford v. Hicks*, (36 Ala. 96,) *Curmand v. Wall*, (1 Bailey, 209,) and *Cooper v. Saunders*, (1 Hen. & Mun. Va. 412,) the motion must prevail. The act of 1857-58 does not apply to a case like this. Sections 670 and 673 of the Code confer jurisdiction generally on the probate court to *bind out apprentices*; and sections 1215 and 1218 confer on the *probate judge* the power "to bind out as apprentices," persons of a particular description; and the whole chapter in which these sections are found is one making "provision for the poor," and no appeal is given in such cases; neither on the action of the court under section 1215, nor section 1218. Neither chapter 11, part 2, title 4, nor chapter 1, part 3, title 4, of the Code, gives an appeal in such a case.

The cases of *Ex parte Croom & May*, (19 Ala.,) *Ex parte Burnett*, (30 Ala.) and *Cooper v. Saunders*, (*supra*,) indicate the procedure by which such a case may be revised. The application in this case was made to the probate judge under section 1215 of the Code. An order must be made dismissing the appeal.

EX PARTE HEWITT.

[APPLICATION FOR MANDAMUS TO CHANCERY COURT.]

1. "*Stay law*" not applicable to suit in chancery.—Suits in chancery are not within the provisions of the first section of the act approved February 20, 1866, entitled "An act to regulate judicial proceedings."

APPLICATION for a *mandamus* to the Hon. N. W. COCKE, chancellor of the southern chancery division, presiding in the chancery court at Mobile, requiring him to proceed and hear a certain cause pending in said court, wherein the petitioner, David M. Hewitt, is plaintiff, and his wife, Mrs. Eliza Jane Hewitt, is defendant. The bill was filed on the 3d May, 1866, and sought a divorce *a vinculo matrimonii*. A decree *pro confesso*, on personal service, was regularly entered on the 26th June, 1866; and an order for the publication of the testimony was passed on the next day. "The complainant thereupon applied to the court to hear the cause, and for a decree in the cause; but the court refused to receive the cause, or to hear the same, or to make any decree therein, or to entertain jurisdiction thereof, for any other purpose than to continue the cause, because the present is the first term of the court since the bill was filed."

P. HAMILTON, for appellant.

A. J. WALKER, C. J.—The argument of the counsel for the petitioner most satisfactorily shows that a suit in chancery is not embraced in the first section of the "act to regulate judicial proceedings," approved February 20th, 1866. The regulations of that section, as to appearance, pleading, and trial terms, are not susceptible of application in the chancery court. In that forum, there must be plea, answer, or demurrer, within thirty days, or a decree *pro confesso* may be taken; and the time of hearing causes in chancery can not be governed by the terms of court, but must depend upon the question whether the cause is at issue.

Let the *mandamus* issue as prayed.

FULLER'S ADM'R vs. FULLER.

[BILL IN EQUITY FOR CANCELLATION OF DEED OF GIFT.]

1. *Cancellation of deed, on grounds of fraud, duress, and undue influence.*
A deed of gift, by which the grantor conveyed all his property, real and personal, to his living children by his first wife, excluding the children of two deceased sons by her, and all his children by his second wife, and reserving to himself only the right of possession and a support during his life,—cancelled and set aside, at his instance, on proof that he was seventy years of age, illiterate, and enfeebled in will and intellect; that he had long cherished and expressed a desire and intention to provide for his children by his second wife, who were born out of lawful wedlock; that his elder sons, who were resolute and determined men, were cognizant of this desire and intention on his part, and opposed its execution; that they had taken possession by force of more than forty of his slaves, in order to prevent the consummation of a contract of sale which he was about to make, preparatory to a settlement on his second wife and children; that the deed was executed for the purpose on his part of procuring the restoration of these slaves, and that they were restored to him immediately after the execution of the deed.
2. *Second marriage of guilty defendant in divorce suit.*—A statutory prohibition of subsequent marriage by the guilty defendant in a divorce case, has no extra-territorial operation, and does not affect the validity of a subsequent marriage in another state.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed on the 29th February, 1856, by Alfred Fuller, against his sons, John B. and Wm. Fuller, and others; and sought the cancellation of a deed, on the grounds of fraud, duress, and undue influence. The deed was dated the 26th day of March, 1855, and was as follows:

“State of Alabama, } Know all men by these presents,
 Perry County, } that I, Alfred Fuller, of the county
 and State above written, for and in consideration of the
 love and affection which I have for my legal children, or
 children in legal wedlock begotten, as well as for other and

good considerations, and also for the sum of five dollars to me in hand paid by my said children, at and before the sealing of this deed, (the receipt whereof is hereby acknowledged,) do hereby give, grant, and convey, unto my children in lawful wedlock begotten, all my estate which I now own or possess, whether the same be lands, negroes, or other personal or real estate, to have and to hold the same unto my said legal heirs or children, and unto their heirs forever; upon the condition, however, that I, Alfred Fuller, am to remain in the possession and control of the said granted lands and property, for and during my natural life, and enjoy and use the same for myself and family to support amply upon during my life; all the natural increase of said property, over and above an ample and comfortable support for myself and family, to be and remain with the common stock of the property, to be divided among my said legal children or heirs at my death; such children to take in equal parts among them the said property as is or may be provided for by the statute laws of the State of Alabama; the said children to let the said property remain in the hands of the grantor, unmolested, during his lifetime, upon condition as above. The income of said property over and above the support above named is also to remain to be divided as provided in this deed. And I, the said Alfred Fuller, declare this instrument to be my deed, to take effect, subject to the above condition, from the execution hereof, and be binding and irrevocable, and not as a will. But, if I am disturbed or molested in the control of said property, during my life, by my said children, then this conveyance is thereby to be defeated and annulled. In witness", &c.

Answers were filed by the principal defendants, denying the charges of fraud, undue influence, &c., and asserting the validity of the deed. On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

W. M. BROOKS, for appellant.

JOHN & CHAPMAN, *contra*.

A. J. WALKER, C. J.—The important question of this case is, whether the evidence is such as to justify a decree setting aside the deed of Alfred Fuller, made on the 26th March, 1855. This deed, upon a nominal consideration, conveys to the children of the grantor "begotten in lawful wedlock" all the grantor's property, real and personal, reserving to him the right to the possession of the property during his life, but subject to the restriction, that all increase and income, beyond an ample and comfortable support for himself and family, should be incorporated with the *corpus* of the estate. The grantor had two sets of children. The older set were begotten in lawful wedlock; and of these, two sons had died, leaving children. This set of descendants lived apart from the grantor. The younger set of children were the fruit of an illicit connection with a woman whom, while the wife of another man, he had defiled, and taken into his house. He married in 1840; but the second set of children were born during his concubinage with her. This woman, and those children, composed his family at the date of the deed, and were recognized and treated by him as his wife and children. This woman and her children, and the children of the grantor's deceased sons of the older set, were excluded from all participation in the estate of the grantor, in the event of their surviving him; and he was, by an irrevocable instrument, deprived of the power of providing for them.

To make some provision for this woman and her unlawfully begotten children, is proved to have been, as far back as 1837 or 1838, an object of intense desire, and even painful solicitude to the grantor; and such a desire seems to have continued up to the day of executing the deed. No reason for a change of sentiment or feeling in reference to the woman and her children is even attempted to be made, nor is any explanation made of a purpose to exclude from participation in his estate the children of the deceased sons of the first set of children.

The grantor, at the time of making the deed, was about seventy years of age. He had been a man of great natural vigor of intellect and will; but the evidence demonstrates that the vigor of his intellect, and the force of his

will, had declined. His sons belonging to the first set of children were determined, resolute, brave men; one of them esteemed by a competent judge to have been a dangerous man. These sons were deeply incensed at the criminal conduct which had given birth to the grantor's second set of children, and some of them imputed to him the murder of their mother. The grantor dreaded the opposition of these sons to any act providing for his illegitimate children and their mother; and this was manifested, at least seventeen years before the deed was made, by the expression of a desire to conceal any arrangement to provide for them from the sons of his older set of children.

The grantor was an illiterate man, who could write his name; but it appears doubtful, from the evidence, whether he could read manuscript so as to understand it. He had accumulated a good, if not large fortune; and his love of property was so great as to procure for him, from one of the witnesses, the appellation of "skin-flint."

This old man, enfeebled at least in will and capacity for resistance, seventy years of age, loving property, anxious to provide for the woman whom he had made the mother of illegitimate offspring, and for her children, and for many years cherishing that as a darling object; estranged, to some extent at least, from his first set of children, and dreading the opposition of some of them,—made a deed, whereby he irrevocably stripped himself, with a small reservation, of all property of every description, destroyed his power to provide any thing for the woman and the children she had born him, effectually thwarted his long-cherished object of providing for them, as well as for the orphans of his dead sons; and all this in favor of a set of children, who certainly presented to him no peculiar ground for preferment over his other children. Such a deed is unnatural, unreasonable, and suspicious.

At the time when the deed was executed, forty-one of the grantor's negroes were in the possession of some of his sons, belonging to the first set of children, in favor of whom this extraordinary deed was made. These negroes were restored to the grantor, immediately after the execution of the deed; and the evidence convinces us that they were

restored because the deed was executed, and that the deed was executed in order to procure the restoration of them; and that if the grantor's mind had been left to its free and uncontrolled action, he would not have made such a deed. We are further convinced by the evidence, that the grantor had made a contract for the sale of his property, with a view to preparing to make a more secure provision for the woman with whom he had last lived, and his children by her; that some of the sons, belonging to the set of children in whose favor the deed was made, in the night-time, and without the grantor's knowledge, carried off forty-one of his most valuable slaves, for the purpose of preventing the consummation of the sale; and that, to obtain a restoration of those slaves, and to avoid further conflict with those sons, the grantor made the deed; and that those sons availed themselves of the possession of the slaves, and of the inequality of their aged father in a contest with them, to procure the deed.

We are further convinced that, either from the confusion and perturbation of mind under which the deed was signed, or from the haste in which its contents were considered and discussed, or from his failure to comprehend the reading of it, or from his own inability to read it intelligently, the grantor misunderstood it, and thought that under it all his lawful heirs, which would have included the second set of children, and the children of his dead sons, would have shared in his prosperity, and that the deed was executed under this mistake.

Finding these conclusions of fact, it is clear that, upon established principles of law, the deed should be set aside. *Thompson v. Lee*, 31 Ala. 292; *Taylor v. Kelly*, 31 Ala. 59; *Pool v. Pool*, 35 Ala. 12; *Huguenin v. Baseley*, 14 Ves. 273; *Dent v. Bennett*, 4 M. & C. 269; *Taylor v. Taylor*, 8 How. 183; *Whelan v. Whelan*, 3 Cow. 537; 1 Story's Equity Jur. § 222.

2. We have no doubt of the legality of the marriage of Alfred Fuller with Susan, the mother of his last children. At the time of that marriage, he was himself a widower, and was, therefore, competent to contract marriage. The former husband of Susan had previously obtained a divorce

in Georgia, where he resided. This rendered her competent to marry. If there was any provision of the Georgia law, prohibiting the guilty defendant in a divorce suit from marrying again, this prohibition had no extra-territorial operation; and notwithstanding such prohibition, the guilty party would be competent to marry in the State of her residence.—2 Bishop on Marriage and Divorce, §§ 700-04; 1 Bishop on Marriage and Divorce, § 306.

The decree of the court below is reversed, and a decree must be here rendered, setting aside and annulling the deed made on the 26th March, 1855, and the cause must be remanded for further proceedings in conformity to the foregoing opinion and decree.

BYRD, J., did not sit in this cause, having been of counsel in the court below.

REPORTS
OF
CASES ARGUED AND DETERMINED
AT THE JANUARY TERM, 1867.

AARON (A FREEDMAN) *vs.* THE STATE.

[INDICTMENT FOR LARCENY OF HORSES.]

1. *Repeal of criminal statute after sentence, but before its execution.*—When the prisoner in a criminal case, having been sentenced to death, is not executed on the day specified in the sentence, and is brought before the court at a subsequent term to be re-sentenced, (Penal Code, § 378,) the repeal of the law under which he was convicted and sentenced, since the original sentence was pronounced, is a sufficient “legal reason against the execution of the sentence,” and requires that he should be discharged. (A. J. WALKER, C. J., *dissenting*.)
2. *Same; saving clause in repealing statute.*—The proviso to the act adopting the new Penal Code, which provides that nothing contained in the repealing clause “shall affect any prosecution now pending, or which may be hereafter commenced, for any public offense heretofore committed,” &c., does not apply to a case in which sentence of death was legally rendered before the day on which the new Penal Code went into effect, and, the sentence not having been executed on the appointed day, the prisoner is brought before the court at a subsequent term, after the repeal of the law under which he was sentenced, to be re-sentenced.

FROM the Circuit Court of Tuskaloosa.

Tried before the Hon. JOHN HENDERSON.

THE prisoner in this case, who was a freedman, “usually known and called Aaron Cosby,” was indicted in said circuit court, at its November term, 1865, together with another freedman by the name Ely, *alias* Ely Carlisle,

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for the larceny of two horses; was tried and convicted at the same term of the court, and sentenced to be hanged on the 9th day of March, 1866; and the judgment was affirmed by this court, on appeal, at its January term, 1866. See the case reported in 39th Ala. Rep. 684-90. On the day appointed for the execution of the sentence, the military authorities of the United States at Tuscaloosa interfered, and prevented the sheriff from executing the sentence of the court; and the prisoner was thereupon re-committed to jail by the sheriff. At the October term, 1866, the prisoner was again brought before said circuit court; "and the court proceeded to inquire into the circumstances of the case, to see whether or not any legal reason existed why he should not be again sentenced to death, pursuant to the verdict of the jury and the original judgment of the court." The prisoner, by his counsel, urged the repeal of the law under which he was convicted and sentenced, as a legal reason why he should not be again sentenced to death; but the court overruled his objections, and again pronounced sentence of death against him; to which decision and judgment of the court the prisoner duly reserved a bill of exceptions.

W. R. SMITH, for the prisoner.

JNO. W. SANFORD, Attorney-General, *contra*.

JUDGE, J.—It is provided by statute in this State, that, "whenever any person is sentenced to the punishment of death, the court must direct that he be hanged by the neck until he is dead"; and that "such sentence must be executed by the proper executive officer of the law, on such day as the court may appoint, not less than four, nor more than eight weeks from the time of the sentence"; and further, that "when, from any cause, any convict sentenced to death has not been executed pursuant to such sentence, the same stands in full force, and the circuit court of the county in which such convict was tried, on the application of the solicitor of the circuit, must direct the convict to be brought before it, or, if necessary, must issue an order in writing to that effect; or if at large, may issue a warrant for his

apprehension ; and upon such convict being brought before such court, it must inquire in the circumstances, and if no legal reason exists against the execution of such sentence, must sentence the convict to execution on a day to be by such court appointed.”—Code, § 3638 ; Penal Code, § 378.

Whilst in England, and in some of the States of the Union, it is not the practice, in cases of capital sentence, for the court to make the day upon which execution is to be done a part of the original sentence ; yet such is the practice in this State ; and it has been held by this court, that a sentence to capital punishment is defective, if it omit to specify the precise day upon which it is to be executed.—*Russell v. The State*, 33 Ala. 372.

It is also well settled, both in England and in this country, and such in effect is the provision of our statute before quoted, that if the day which has been fixed for the execution of the sentence has passed without its being executed, the court should fix another day ; and the judgment remains good, though the time has elapsed, until its command is executed.—1 Bish. Cr. Procedure, § 879. Hawkins, book 2, chapter 51, section 7, says : “ It is clear, that if a man, condemned to be hanged, come to life after he be hanged, he ought to be hanged again, for the judgment is not executed till he be dead.”

It is furthermore the law, that the repeal of a statute imposing a penalty, though after conviction, arrests the judgment. In such a case, the statute repealed “ must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded, while it was an existing law.”—Sedg. Stat. & Con. Law, 130. But such a result may be prevented by making the repealing law prospective in its operation, or by the insertion of a saving clause therein to prevent the operation of the repeal, and continue the repealed law in force, as to all pending proceedings and prosecutions.

Whilst such is the effect of the repeal of a statute imposing a penalty, after conviction and before sentence, what is the effect if the repealing law intervenes between the judgment or sentence and the execution ? In such a case, in the absence of express statutory provision, the execution

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of the sentence follows as a necessary consequence, because, after an adjournment of the term at which the sentence is pronounced, there is no process by which the court can regain possession of the cause, and arrest or modify the judgment; and the sheriff, having no discretion, must carry the sentence into execution. For this reason, the effect of a repeal, intervening between the conviction and the sentence, is not the same as when it intervenes between the sentence and the execution. In the latter event, if there be no statutory enactment controlling the question, executive clemency would be the only means of preventing the sentence from being carried into execution.

Was there any sufficient legal reason, within the meaning of section 378 of the Penal Code, before quoted, why the prisoner in this case, when last brought before the court, should not have been re-sentenced to capital punishment? And if any such reason did exist, was the court below invested with the power, under said section, to discharge the prisoner?

The conviction and sentence took place under the act of October 7, 1864, which affixed the punishment of death, or imprisonment in the penitentiary, at the discretion of the jury trying the case, for the larceny of any "horse, mare, gelding, colt, filly, or mule." This act was repealed by the "Act to establish a new Penal Code," which repealing act did not take effect until the Penal Code went into operation under the proclamation of the governor, which was on the 1st day of June, 1866.—Penal Code, pp. 7-8. Thus, between the first and last sentence of the prisoner to capital punishment, the law under which he was tried and convicted was repealed. This was a sufficient legal reason why the prisoner should not have been again sentenced to the punishment of death; for, as before stated, (and there is no conflict of authority upon the point,) if the repeal had occurred after conviction, and before sentence, it would have arrested the judgment.

If, when the court was called upon to sentence the prisoner a second time, its power was restricted to the simple duty of fixing another day for the execution, (an act not involving the exercise of such judicial power as would give

the court control over the judgment,) the intervening repeal could not have been regarded by the court. Such was held to be the law in *Addington's case*, 2 Bailey, 516. But, under the operation of section 378 of the Penal Code, the power of the court was not thus restricted. By that section, it was made the duty of the court to "*inquire into the circumstances, and if no legal reason existed against it,*" to re-sentence the prisoner. But, if any such legal reason did exist, it was the duty of the court, within the meaning of the Code, to have discharged the prisoner. Otherwise, the ascertainment of any legal reason against the execution of the sentence would be a vain and nugatory act. The meaning of the provision that the original sentence is to "stand in full force," is, that the convict is not to be discharged solely because of the day having passed which was fixed for his execution; nevertheless, the court must, in such a case, perform the duties enjoined upon it. But, in making the necessary inquiry, the court, within the meaning of the Code, is restricted to the consideration of legal reasons founded upon circumstances occurring subsequent to the original sentence. Therefore, its powers are not as extensive over the judgment, as were the powers of the court at the term at which the case was tried; and such is not our argument. To hold that a *pardon* would be the only legal reason which the court might consider and act upon, in such a case, would be doing violence to the plain language of the statute—would be to legislate under the guise of judicial interpretation.

If the intervening repeal of the law under which the prisoner was convicted and sentenced, was not a sufficient legal reason to authorize his discharge, the sentence of death would be executed, when there was no law in existence to authorize it—a proposition abhorrent to justice as well as to mercy.

If the repeal had intervened between the conviction and the sentence, that, as we have seen, would have been a sufficient legal reason for arresting the judgment. Is the legal reason against execution, when the prisoner is brought before the court to be re-sentenced, any the less potent or sound, if the repeal occurs between the original and second sentences? Is it *wrong* to hang a man under a law which

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has been repealed, if the repeal occurs between the conviction and the original sentence, and *right* to hang him, if the law is repealed after the original and before the second sentence? If such a distinction exists, it can rest upon no solid reason or sound principle.

// We should feel justified in our construction of section 378 of the Penal Code, even if its correctness was not free from doubt, for the law is mild and merciful in its intentions towards those who are the objects of punishment; and, under the circumstances of this case, we feel that we occupy the safest and strongest ground in adopting that construction which favors human life.

2. One other question remains to be considered. The saving clause in the act repealing the act of the 7th of October, 1864, has no application to this case. It is in the following words: "*Provided, however, that nothing in this section contained shall affect any prosecution now pending, or which may be hereafter commenced, for any public offense heretofore committed, or which may hereafter be committed at any time prior to the day on which said new Penal Code shall go into effect, as by this act provided.*"—Penal Code, pp. 7, 8. The prosecution of the prisoner was commenced and had ended, by a final judgment in the court below, and an affirmance thereof in this court, *before the repealing act took effect*. The saving clause, being an enactment penal in its character, must receive a strict construction; and being thus construed, it cannot reach the case of the prisoner.

The sentence of the court below must be reversed, and the prisoner discharged from custody.

A. J. WALKER, C. J.—Section 378 of the Penal Code authorizes the court to withhold the sentence, when "a legal reason" exists why it should not be inflicted. The repeal of the law under which the original conviction and sentence were had, is not, in my opinion, a legal reason for withholding the sentence. The statute does not ascertain what is a "legal reason" for not passing the sentence. It leaves the question as to what constitutes such legal reason to the determination of principles not announced in it, and

to be found elsewhere. Those principles must be the principles of the common law. The question is, therefore, reducible to the inquiry, whether the repeal of a statute after a conviction and sentence, and after the adjournment of the court by which the sentence was pronounced, is a legal reason for not inflicting the punishment prescribed in the repealed statute. It certainly is not. A repeal of a statute, without a saving clause, will prevent a conviction or sentence under it, or even justify an arrest of the judgment, on motion made during the term. But, the court having adjourned, its judgments are final and conclusive, unless set aside upon a direct proceeding for that purpose. If such repeal be a legal reason for not executing a sentence, the sheriff should always be arrested, if the repeal occurs before the day of execution, by writ of *habeas corpus*; and even if the convict were in the penitentiary, he should be released, upon the repeal of the statute under which he was convicted. The concession that a convicted prisoner must be executed on the appointed day, notwithstanding the repeal of the statute under which the conviction was had, in my judgment, yields the entire question; for, if an execution under a law repealed is wrong, it would be a reproach to the system of jurisprudence, which afforded no preventive remedy.

The argument is made, that the court before which the prisoner is brought to be sentenced has the same power, so far as this question was concerned, the court which tried the case had when it passed sentence, and may apply the same principles which the court trying the case could have done. It is contended that, as the court which tried the case would have refused to try the prisoner under a repealed statute, so should the court in this case have withheld the sentence. I admit that, if a statute were repealed between the trial and the sentence, the court during the term, while the cause was still *sub judice*, would arrest and vacate the judgment; but I do not admit that the repeal of the statute after the adjournment of the court would authorize a judge, before whom the prisoner was brought to be sentenced, to discharge him. The last named judge has no power to arrest the judgment, as the court

had which tried the case; and the statute seems to guard against the inference of such a power. Its language is, that when, from any cause, any convict sentenced to death has not been executed pursuant to such sentence, the same stands in full force. The sentence standing in full force, it can not be that the power of arresting it can be in any other than an appellate tribunal. The sentence is but the judgment which the law pronounces; and while it stands as the announcement of the law, it is not, in my opinion, the province of a judge to vacate it. The decision of the majority of the court leads to consequences, which I do not think the legislature ever designed. Two men may be convicted under the same indictment, and by the same verdict, and sentenced to be executed on the same day. If the statute is repealed after the sentence, the sheriff must nevertheless proceed to execute the sentence; but, if one of them should escape, he must be discharged, while the other will be lawfully executed. The effect of the sentence is made to depend upon the question whether the prisoner escapes. If he does not escape, he is rightfully executed under the sentence. If he commits a crime by escaping from the officer, when carried before a judge to be re-sentenced, he must be discharged. If the prisoner is pardoned, a case is presented for which the law clearly provides; and this pardon being a legal reason why the sentence should not be executed, would prevent his execution by the sheriff, or his sentence by the court.

KING *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Admissibility of confessions.*—The prisoner's confessions in this case were held admissible, although they were made to the officer who had him in custody, and was carrying him before an examining court, and who had said to him, "If you know anything about the

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circumstances, it will be best to tell the truth about it ;" and although another officer had previously told him that his supposed accomplice had been arrested and shot, which statement was false, and was made to induce a confession. (BYRD, J., *dissenting*.)

FROM the City Court of Mobile.

Tried before the Hon. H. CHAMBERLAIN.

THE prisoner in this case, William King, (who is described in the marginal statement of the names of the parties in the minute-entries as a negro and freedman,) was indicted at the June term, 1866, jointly with one Henry Jordan, for the murder of Ashmore Edwards, "by striking him with an axe, or weapon of the like kind." On the trial, at the same term, as the bill of exceptions states, the following evidence was adduced :

"Levi H. Norton testified, in substance, that on the night of April 30th, or 1st of May, 1866, he, in company with another gentleman, arrived at Cleveland's ferry, where the deceased was engaged as ferryman, about nine o'clock; that defendant was in the flat used as a ferry-boat, and on the other side of the river; that he hailed the boat, and defendant pulled across and put them over, leaving the deceased at his house near the ferry. Defendant then got into a buggy, with a white man whom he (witness) did not know, and started on the main road, (known as the Telegraph road,) and drove ahead of them for three-quarters of a mile, when defendant and the man with him turned to the right. Witness called to them, thinking they were strangers, and had taken the wrong road; but they paid no attention to him. Witness lives about nine miles from the ferry. The next morning, defendant, still in company with the white man, passed witness' house. Witness stated to them, that he had called them the night before when they turned off the road. The white man who was with defendant, said that it had been a long time since he had travelled on that road. The witness stated other facts in this connection, but not material to the points reserved. John R. Davidson testified, in substance, that he lives with Mr. McKim, about two or three miles from the ferry, and to the left of the Telegraph road; that about three, or half past

three o'clock, on the night of the murder, two men in a buggy, of whom he recognized defendant as one, drove up to the house, and, after parleying and getting directions, turned back the way they had come; that it was a bright night, and he distinctly recognized defendant as one of the men; that they betrayed unusual excitement; that the first thing he heard was an exclamation by defendant, saying, 'Jesus Christ! here is a creek'; that they were much excited, and made inquiry as to the way, and were informed they were compelled to go back into the main road. The witness gave other testimony, not material to the points reserved.

"Andrew O. Murphy testified, in substance, that on the morning of the —— day of May, 1866, he saw where the old man, the ferryman, had been murdered; saw an axe and a hatchet, covered with blood and hair; saw where he had been dragged to the river; in company with others, made preparation, and fished the body out of the river; found the skull broken, and head and face much mutilated; saw the tracks of two persons engaged in dragging the body of deceased to the river. He further testified, that he had tracked the buggy from where they left the main road, as stated by Norton; that they went down about half a mile to the right, then turned at right angles, and crossed the main road, and went back another road to the swamp near the ferry; that the buggy had been driven into a clump of bushes near the swamp; that the tracks showed that, when they left this place, it was at high rate of speed; that they were tracked around into the road to McKim's, and back again by the same road to the main road. He testified as to other matters not material to the points reserved. Ellison testified, that he lives about nine miles from the ferry, on the Telegraph road; that he got up about day-light on the morning after the murder; saw two horses tied to the bushes, and a buggy, a short distance from the house; saw defendant there, who said they got there about twelve o'clock that night; saw another man there, who was covered up with clothing, and who asked for some milk. The white man he suspected of having the small-pox, and requested them to leave his place. When

he first saw them, the horses were unhitched and unharnessed, and were feeding. He testified as to other matters not material to the point reserved.

“Wm. B. Shelton (a policeman) says, in substance, that while he had defendant under arrest, and was on the boat bringing him down the river, he had a conversation with him, in which he, Shelton, told him that Jordan (the white man) was arrested and had been shot; but stated that such was not true, and that he had done so to make King confess; that King did not confess, or make any statement at that time, but afterwards, and on another occasion, voluntarily said to witness, that the ferryman had promised him one dollar for taking over Mr. Norton, and that he went back to get it, but the old man (deceased) refused to pay it, and they had some words about it. Here the conversation was interrupted. Henry Malone (policeman) says, that he went to the jail to bring defendant before the examining court; that he took him in the buggy, when King asked him if it was true that Jordan had been arrested, saying he had heard so. Malone here attempted to narrate a confession made to him by defendant, which was objected to by defendant's counsel. Malone says, defendant remarked to him that he (King) was in a bad scrape; and that he then said to King, If you know *any thing about the circumstances, tell the truth about it, that it will be best to tell the truth about it.* The court overruled the objection, and permitted witness to narrate the confession. Witness then testified, that King said that he (King) and Mr. Jordan came back to the ferry, and that Jordan crossed over and killed Edwards (the ferryman), but that he had nothing to do with it; that Jordan had promised to give him half the money, and to pay him his wages, but had never done either. At the request of the defendant, it was admitted by the State, that King had been *bona fide* employed by Jordan to take him up the country; that Jordan has escaped from the jail of Mobile county, and was running away. It was further proved by defendant that he bore a good character as a peaceable and honest servant. It was also proved that Jordan had been arrested, but again made his escape. There was other evidence not

material to the question reserved. Defendant excepted to the overruling of his objection to the admission of Malone's evidence."

No counsel appeared in this court for the prisoner.

JOHN W. A. SANFORD, Attorney-General for the State, cited 1 Greenl. Ev. § 229; *Aaron v. The State*, 37 Ala. 106; *Seaborn v. The State*, 20 Ala. 15; 7 Car. & P. 486.

JUDGE, J.—The books abound in adjudications upon the question, as to what degree of influence will exclude the evidence of confessions in criminal prosecutions; and upon this question there has been much contrariety of decision. "This is the more suprising, as the inquiry presents no peculiar difficulty. There is no intricate problem to be solved, no recondite principle to be explored or extracted." Joy on the Evidence of Accomplices, quoted in 1st Leading Cr. Cases, 182. It is not necessary, in this case, that we should enter into any general discussion of the subject, nor that we should notice with particularity the irreconcilable conflicts of authority upon the question. It seems now to be generally agreed, that many of the cases have gone too far in rejecting evidence of this character. Baron Parke, in *Regina v. Baldry*, (1 Leading Cr. Cases, 164,) said: "I confess that I can not look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have too frequently been sacrificed at the shrine of mercy."—1 Taylor on Ev. 369. Erle, J., in the same case, said: "I am much inclined to agree with Mr. Pitt Taylor; and according to my judgment, in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of *guilt*." And in speaking of the rule relating to the exclusion of such confessions, Mr. Phillipps, in his able treatise on the Law of Evidence, says: "The cases, probably, are rare in which such unfounded self-accusations

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occur, or at least where a jury would be misled by them ; and certainly the rule occasions, in a multitude of instances, the escape of the guilty. *There is a general feeling, not unfounded, that the rule has been extended much too far, and been applied in some cases where there could be no reasonable ground for supposing that the inducement offered to the prisoner was sufficient to overcome the strong and universal motive of self-preservation.*"—1 Phil. Ev. (4th Am. ed.) 543. See, also, *Aaron v. The State*, 37 Ala. 106.

No controversy exists as to the proposition, that deliberate confessions of guilt are the most effectual proofs in the law. But, to authorize such a confession to be introduced as evidence, it must be first shown to have been voluntarily made.—*Mose v. The State*, 36 Ala. 211. This is usually shown by negative answers to direct questions, as to whether the confession had been procured by hopes held out, or fears excited. But, although such is the usual course, still, direct questions, of such or similar import, are not indispensably necessary. The confession is to be received or rejected by the court upon a preliminary inquiry into the circumstances under which it was obtained ; and if it appears, by a recital of the attending facts and circumstances, that the confession was voluntary, it is admissible in evidence.

It is a legitimate conclusion from the facts appearing of record in the case before us, that the court made preliminary inquiry into the circumstances under which the prisoner's confession was obtained, and then overruled the objection to its admission. Did the court err in admitting the evidence?

William B. Shelton, a policeman, testified that, while he had the prisoner under arrest, and was taking him on a boat down the river, he told the prisoner that Jordan had been arrested and shot. Jordan, it appears, was deemed an accomplice of the prisoner, in the commission of the crime charged. The witness admitted that what he had told the prisoner, about Jordan having been arrested and shot, was untrue, and that he had told him so to induce a confession. The witness stated, that the prisoner did not confess, nor make any statement in reply at the time ; but that he after-

wards, and on another occasion, voluntarily said to witness, "that the ferryman had promised him one dollar for taking over Mr. Norton, and that he went back to get it, but the old man (deceased) refused to pay it, and they had some words about it." The witness stated, that here the conversation was interrupted.

No objection was interposed to the introduction of this confession; and if there had been, it could not have been legally excluded; for it seems to be well settled, that a confession is admissible, although it is obtained by artifice or deception. In *Burley's case*, the prisoner was told untruly, and as an artifice, when in jail, that his accomplices were in custody. Upon hearing this, which was said to induce a confession, he confessed. The confession was admitted in evidence. This case is cited in *Phillipps on Evidence*, and mentioned by *Roscoe*, and by *Starkie* who says the conviction was afterwards approved by the judges.—1 *Lead. Cr. Cases*, note, p. 202.

Henry Malone, policeman, another witness, testified that he went to the jail, to bring the prisoner before the examining court; that after placing him in a buggy for that purpose, the prisoner asked witness if it was true that Jordan had been arrested, saying he had heard so. The prisoner remarked to the witness that he, the prisoner, "was in a bad scrape." The witness then said to the prisoner, "*If you know anything about the circumstances, tell the truth about it; it will be best to tell the truth about it.*"

We do not controvert the correctness of the rule, as laid down by the elementary writers, that a promise of benefit or favor, or threat or intimation of disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement, either of hope or fear.—1 *Phillipps on Evidence*, (4th Am. ed.) 544; 1 *Greenleaf on Evidence*, § 222. The object of this rule, as stated by Mr. *Phillipps*, is, "to exclude all confessions which may have been procured from the prisoner by leading him to suppose that it will be better for him to admit himself to be guilty of an offense, which he really never committed."

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The prisoner, in the case before us, could not have been led by the witness Malone to make any such supposition. It will be observed, that the prisoner commenced the conversation; and the witness only exhorted him, if he knew anything about the circumstances, to speak the truth—that it would be best to tell the truth about it. The admonition to say he was innocent, if such was the truth, was just as strong as to say he was guilty if that was true; and he was warned that it *would be best* to say he was *innocent*, if such was the *truth*, as strongly as he was warned to say he was *guilty*, if that was the *truth*; no hopes being held out, or fears excited, to speak the one way or the other. Confessions, as already stated, which may have been procured by the prisoner's being led to suppose that it will be better for him to admit himself to be guilty of an offense which he really never committed, should be excluded; but it can hardly be said that telling a man to speak the truth is advising him to confess that of which he is not guilty.—*Enoch's case*, 5 Car. & Payne, 539. In the language of Erle, J., in *Regina v. Moore*, (2 Dennison, 522,) "As a universal rule, an exhortation to tell the truth ought not to exclude a confession."—See, also, *Fouts v. The State*, 8 Ohio, 98.

Aaron v. The State, 37 Ala. 106, was at least as strong a case for the prisoner as is the present. In that case, the substance of what the bailiff said to the prisoner was, that "truth was the best policy; that if he did the act, it was best to confess it; but if he did not do the act, then there was no wish he should say so." It was held by this court, that the prisoner's confession, in response to this exhortation, was properly received in evidence. In the opinion by STONE, J., the court say: "The prisoner, if innocent, was warned not to say he had done the deed, in language equally as strong as that which sought his confession if guilty. Truth was asked for; and we cannot conceive that any hope or fear was offered to the prisoner, to induce him to make a false confession of guilt."

Our conclusion in this case is, that the court below did not err in receiving evidence of the prisoner's confessions; and having carefully looked through the record, and finding

no error therein, the judgment of the city court must be affirmed, and the sentence of law carried into execution.

BYRD, J.—I am unable to concur with the majority of the court in the result attained in this most momentous issue to the prisoner. I admit that Baron Parke had just cause of shame when he looked into the decisions on the question involved in the determination of this case. But it seems to me the learned baron had more cause for shame in the many departures made from the wise and venerable principles of the common law on one side of this question, than on the other. Voluntary confessions were always admissible at common law, to whomsoever made. But to be so, they must appear to have been voluntary; and unless the court was clearly satisfied that they were so, they were excluded; and the court must decide the question, and cannot refer it to the jury.—*Bob v. State*, 32 Ala. 560. The law was more cautious to scrutinize the circumstances under which confessions were made to officers who had the custody of the prisoner; and justly so. When the law, by its officers, takes the custody of a human being for purposes of justice, it should, at the same time, throw a shield of protection around him, to guard him against the natural solicitations and importunities of the ministers of justice. Cut off, as the prisoner is, from any association with his friends, except in the presence of the officer,—with his mind burdened and oppressed with impending calamity, and a serious charge made against him, involving life and death, and anxious to reply to the interrogation of the officer having him in charge, he may make, and often has made confessions, the very absurdity and falsehood of which may involve him in greater danger, and sometimes in a conviction of the crime with which he is charged. If he answers that he is not guilty, it is not evidence for him. His only chance to get his confessions in as evidence, is to admit something against himself. If he is innocent, and so answers, there is an end of the matter, unless, in the agony of his mind, he makes some statement which turns out to be untrue, when that is seized hold of to convict him.

Mr. Greenleaf, in his erudite and accurate treatise on the

Law of Evidence, puts this subject in a true and striking light, in a few sentences. He says, "For, besides the danger of mistake from misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession. *The zeal*, too, which so generally prevails, to detect offenders, especially in cases of aggravated guilt, and the strong disposition, in the persons engaged in the pursuit of evidence, to rely on *slight* grounds of suspicion, which are *exaggerated* into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of *secret* and *atrocious* crime, all tend to impair the value of this kind of evidence, and sometimes *lead to its rejection*, where, in civil actions, it would have been received."—Vol. 1, § 214.

At section 219, he says, "Before any confession can be received in evidence, it *must* be shown that it was *voluntary*." In section 220, he gives examples. In section 222, he says: "In regard to the person by whom the inducements were offered, it is very clear that, if they were offered by the prosecutor, or by his wife, the prisoner being his servant, or by an *officer* having the prisoner in custody, or by a magistrate, or, indeed, by *any one* having authority over him, or over the prosecution itself, or by a private person in the presence of one having authority, the confession will not be deemed voluntary, and *will be rejected*. The authority known to be possessed by those persons, may well be supposed both to animate the prisoner's hopes of favor on the one hand, and on the other to inspire him with awe, and in some degree to overcome the powers of his mind."

Mr. Phillipps, in his learned work on Evidence, puts the matter in an equally clear light. He says: "But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise; for, however *slight* the promise or threat may have been, a confession so obtained cannot be received in evidence, on account of the *uncertainty* and *doubt* whether it

was made, rather from a motive of fear or of *interest*, than from a sense of guilt."

Now, who can say that the confession excepted to in this case, made to an officer, was not made from a *motive of interest*, founded on the declaration of the witness Malone, "that it will be best to tell the truth about it." The very *uncertainty* about it, is, in Mr. Phillipps' opinion, sufficient to exclude the confession. Take the doctrine of Mr. Greenleaf and Mr. Phillipps, as above quoted, and to me it is evident that the confession should have been excluded.

But, even if I were *uncertain* on this question, or had a reasonable doubt, in a case of life and death I would give the prisoner the benefit of that uncertainty and doubt. My construction of the expression used by the witness, and as the prisoner had the right to understand it, is, that he was requested to speak about the "circumstances", which, in my opinion, assumed his guilt, and that it would be best for him to speak the truth about it, if he were guilty. If innocent, and he said so, it would neither have been evidence which the prisoner could have used in his defense, nor released him from custody. Every man is presumed to know the law—a prisoner as well as an officer.

The prisoner may be guilty, but the law requires legal proof, and the verdict of a jury, before he is presumed guilty. There is one singular circumstance in this case. The prisoner asked the witness Malone, "if it was true that Jordan had been arrested", saying he had heard so. Now it does not appear that this question was ever answered. It seems that another officer had told the prisoner that Jordan had been arrested and "*shot*." It seems that King had an idea that it was false. But Malone, if he answered the question, or did not, has not stated; and it shows what is often true, that one is oblivious of circumstances, which, if remembered, might change the whole character of the confession. If Jordan had been shot, as the prisoner had been informed, he could not have understood Malone as seeking to get him to *turn State's witness against Jordan*, when he was told "it was best for him to tell the truth about it."

I do not think that the case of *Aaron v. The State* is the

law; and in a case of life and death, I shall follow what I conceive to be the principles of common law, in preference to the decisions of courts, especially when they are so conflicting.

This conflict and confusion in the adjudications has occurred, in my opinion, by a departure from principle. A slight departure in one case, was the foundation for it in another; and so on, until they are in hopeless and inextricable irreconcilability. A return to acknowledged first principles is the only path to justice, and a strict adherence to them is, in my judgment, the best and safest course to be pursued in all cases of difficulty.

WALLER (A FREEDMAN) vs. THE STATE.

[INDICTMENT FOR RAPE.]

1. *Calling juror.*—There is no statute, or rule of practice, which requires that when a person, specially summoned as a juror in a case of felony, being called at the clerk's desk, fails to answer to his name, he should also be called at the door of the court-house, or that an officer should be sent for him; and the refusal of the court to have him thus called or sent for, at the request of the prisoner, is not erroneous.
2. *Competency and discharge of juror having fixed opinion against capital punishment.*—In a capital case, a juror who states, in answer to a question by the court, that he has a fixed opinion against capital punishment, may be challenged for cause by the State, (Penal Code, § 630,) or may be set aside by the court, *ex mero motu*, although he also states, in answer to questions by the prisoner, "that if he was on the jury, and the law required him to convict, he would do so, notwithstanding the punishment might be capital."
3. *Rape; force, as constituent of.*—To authorize a conviction for rape, it is not necessary that the proof should satisfy the jury that the force used "was such as to create a reasonable apprehension of death" on the part of the female.
4. *Same; penetration, and emission.*—Proof of penetration alone is sufficient to sustain an indictment for rape, (Penal Code, § 642,) when the act is shown to have been committed forcibly, and against the consent of the female.

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5. *Verdict; personal presence of prisoner, and amendment of.*—In a case of felony, it is error to allow the verdict of the jury to be received by the clerk, during a recess of the court, in the absence of the prisoner, even though this be done with the consent of his counsel; and it is also error to allow an amendment of the verdict, unless the record affirmatively shows that the prisoner was present in the court at the time.
6. *Second trial after reversal of former conviction.*—Where a judgment of conviction in a criminal case is reversed, on error or appeal, at the instance of the prisoner, he may be tried again; even where the verdict is informal, or insufficient to sustain a conviction.

FROM the Circuit Court of Dallas.

Tried before the Hon. JOHN MOORE.

THE indictment in this case was returned into court on the 27th November, 1866, and charged that "William Waller, a freedman, forcibly ravished Sarah Rose, a freedwoman." "On the trial," at the same term, as the bill of exceptions states, "while the empanneling of the jury was going on, the name of Joseph Hardie, which was on the copy of the *venire* served on the prisoner, was drawn from the hat by the sheriff, and was called aloud at the clerk's desk; but he did not answer. It was conceded that said juror lived in Selma, and about a half-mile from the court-house. The defendant asked the court to have him called at the door of the court-house, or to send an officer for him, and have him brought into court; but the court refused to do so, and the defendant thereupon excepted. One B. J. Duncan was also on the list of jurors served on the defendant, and resided in Selma; and when his name was drawn from the hat, was called aloud from the clerk's desk, but did not answer. The defendant asked that he also might be called from the door; which was also refused, and the defendant excepted. The names of all the jurors in the *venire* being called before the jury was completed, the court ordered the requisite number to be summoned from the bystanders; to which the defendant objected, until those named had been called at the door, or sent for; which the court still refusing to do, the defendant again excepted.

"T. B. Pierce, one of the tales-men thus summoned from the bystanders, his name being drawn from the hat, was

sworn to answer questions, and was asked by the court if he had a fixed opinion against capital punishment; to which he replied, that in case of a white man he had; and he was then told by the court to stand aside. The defendant's counsel then asked permission to ask him a question, and was permitted to do so; and in reply to the question so put to him, said Pierce stated, that if he was on the jury, and the law required him to convict the defendant, he would do so, notwithstanding the punishment might be capital. The defendant then insisted that said Pierce was a competent juror; but the court thereupon again propounding the question as prescribed by law, and the juror replying, in a very decided manner, that he did have a fixed opinion against capital punishment, the court directed him to stand aside as incompetent; and defendant excepted."

After the evidence was closed, "the defendant asked the court to instruct the jury, that unless they find the force used was such as to create a reasonable apprehension of death, they must find for the defendant"; also, "that rape cannot be committed without emission." The court refused each of these charges, and the defendant excepted to their refusal.

"The court then asked the defendant's counsel, if they were willing for the clerk to receive the verdict of the jury; to which they consented. The judge then withdrew from the court-room for the day. After deliberating a short time, the jury returned with the following verdict, 'We, the jury, find the defendant guilty as charged in the indictment, and recommend him to the clemency of the governor'; and they then dispersed. When court was called the next morning, the judge directed the jury to be re-assembled, and stated to them, after they had assembled, that he had told them the day before, if they found the defendant guilty, they were to fix the punishment, (again telling them what it was,) and asked them if they had agreed on the punishment the night before; and one of their number replied, that they had. The court then directed them to retire, and complete their verdict by adding the punishment. The jury then retired, and in a short time returned, having added to their verdict, as the pun-

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ishment, imprisonment in the penitentiary for life. The court asked them, if that was the punishment agreed on by them the night before; to which they replied that it was, and that it was a mere oversight in not inserting the punishment the night before. All of which was against the defendant's objections, and to all of which action of the court the defendant excepted. On the next day, or the day after the jury had amended their verdict, as above stated, one of the defendant's counsel informed the presiding judge that the defendant was not in the court-room when the jury was directed to retire and amend their verdict, nor when they returned with their verdict; and asked that it might so appear in the bill of exceptions, and that he might have the benefit of an exception thereto."

The several rulings of the court to which, as above stated, exceptions were reserved, and the judgment of the court, are now assigned as error.

GEO. W. GAYLE, and W. C. WARD, for the prisoner.—

1. The court erred in refusing to have the special jurors, who failed to answer to their names, called at the door of the court-house, if not sent for, when it was shown that they resided in the town. Such has been the uniform practice throughout the State, and it accords with the dictates of substantial justice. The law secures to the prisoner, in a capital case, the right to a copy of the *venire*, in order that he may make inquiry into the character of the men who are summoned to try him, and have a trial by a fair and impartial jury. This statutory and constitutional right, so important to him, and so carefully guarded, would be effectually thwarted, in many cases, if the court is allowed, through a desire to punish defaulting jurors, or from any other motive, to summon tales-men, and put them on the prisoner, without first using ordinary and customary means to procure the presence of the jurors specially summoned. Capital cases generally excite public interest, and draw the attendance of a large crowd; and it may often happen that the jurors are not able to force their way into the room, or wait to hear their names called at the door.

2. Pierce was a competent juror, on his own testimony;

and even if he might have been challenged for cause by the prosecution, the court had no right to set him aside of its own motion. A cause of challenge may be waived by the party for whose benefit it is intended; and the failure to raise the objection is a waiver of it. In former days, it was said that the court was of counsel for the prisoner; but it was never heard, except in political prosecutions in England, that the court was of counsel for the prosecution, or could insist on objections which the prosecuting attorney might waive. That the court erred in setting aside the juror, see *State v. Williams*, 3 Stew. 454; *Murphy v. The State*, 37 Ala. 142; 5 Cushing, 295.

3. The court erred in refusing the charges asked. If the offense was committed under the circumstances detailed by the prosecutrix—in a public road, within the hearing, if not the presence of other persons, without any resistance or call for help on her part—the charge as to force was necessary and proper. Mere fear that force would be used, in such case, would not be sufficient to overcome the presumption of consent. As the act was not shown to have been committed forcibly, and against the will of the prosecutrix, proof of mere penetration was not sufficient; even if it be sufficient in any case, which is at least doubtful.—Hale's P. C. 628, note; Roscoe's Crim. Ev. 860.

4. In a capital case, the prisoner must be personally present in the court at every stage of the trial; and the record must affirmatively show his presence.—Wharton's Amer. Crim. Law, § 3197; *Dunn v. Commonwealth*, 6 Barr, 387; *Prine v. Commonwealth*, 6 Har. (Penn. St.) 103; *Eliza v. The State*, 39 Ala. 693; 1 Bishop's Crim. Pro. § 688, and authorities cited in note. The verdict cannot be rendered in his absence, and his counsel cannot waive his right to be present.—*Prine v. Commonwealth*, 6 Har. 103; 1 Bishop's Crim. Pro. §§ 686, 827; *The State v. Hughes*, 2 Ala. 102; *The State v. Cross*, 27 Mis. (6 Jones,) 332; *The State v. Buckner*, 25 Mis. (4 Jones,) 167; 2 Hawk. 619; 1 Archb. Crim. Pl. 173; 1 Chitty's Criminal Law, 636.

5. After the jury had separated, the court had no power to call them together again, for the purpose of amending

their verdict.—3 Bouvier's Institutes, 501, § 3271; *Brister v. The State*, 26 Ala. 132.

6. As the verdict was insufficient to authorize a conviction and sentence, the prisoner ought to have been discharged; and he ought now to be discharged by this court. The case of *Cobia v. The State*, 16 Ala. 780, is at war with all the authorities on this point, and ought to be overruled. A verdict which does not authorize a conviction and sentence, is equivalent to an acquittal; and if the court erroneously renders judgment of conviction upon it, and drives the defendant to the necessity of a reversal on error or appeal, he ought not to be thereby prejudiced.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The refusal of the court to charge that the force employed must have been such as to create a reasonable apprehension of death was not an error. Any array of force, sufficient to overpower the will, is enough to sustain a conviction on an indictment for rape.—2 Bish. Crim. Law, § 941, and authorities cited; 1 Russ. on Crimes, p. 676; *Lewis v. The State*, 35 Ala. 380.

2. Proof of penetration alone will justify conviction.—Penal Code, § 642; Roscoe's Crim. Ev. p. 807.

3. The fixed opinion of a juror against capital punishment rendered him incompetent to try the accused upon an indictment for an offense of which the punishment was death.—*Stalls v. The State*, 28 Ala. 25.

4. The delivery of the verdict to the clerk, during a recess of the court, is not such a receipt of it as will prevent the recall of the jury to amend a clerical error. Until the verdict is received by the court, and recorded, the jury have control over it, although it may be in the hands of the clerk. 5 J. J. Marsh. 675. As the jury still have control over the verdict, and the court can require them to amend their verdict, (*Cook v. The State*, 26 Ga. 595,) there was no error in having them recalled for this purpose.—*Mitchell v. The State*, 22 Ga. 211. For some purposes, the jury can be recalled, even after they have been dismissed by the court, (*Brister v. The State*, 26 Ala. 107,) *a fortiori*, they could be recalled when they had not been so discharged.

5. The law requires the jury to render their verdict in the presence of the accused, so that he may poll them; but he can waive any right secured to him by law.—1 Bishop Crim. Pro. § 422. In this case, he waived this right, when he consented that the clerk might receive the verdict during the recess of the court. The mere correction of a clerical error, in his absence, could not injure him.

BYRD, J.—The assignments of error will be disposed of in the order in which they appear upon the record.

1. There is no law, or rule of practice, in this State, which requires that the jurors, summoned to try a person charged with the commission of a felony, shall be called at the door of the court-house, or be sent for, when their names are drawn. The court did not err in its ruling on this question.

2. The juror Pierce, according to the answers given to the questions propounded to him, was properly discharged by the court.—Penal Code, § 630. The more regular course, perhaps, is, for the State's attorney to challenge for cause in such a case; yet, if the court discharges the juror, it is not an error of which the prisoner has any legal right to complain. The court should see that incompetent jurors are not put upon the prisoner or the State, and that a fair and impartial trial is had. But it is not the duty of the court, *ex mero motu*, to set aside such a juror.—*Murphy v. The State*, 37 Ala. 142. To act, or to decline to act, in such a case *as this*, is not error.

3. The court properly refused to give the first charge asked by the counsel for the appellant. It would be singular if the law should hold a man, who, by force or threats, had sexual intercourse with a female, not guilty of rape, because the force or threats, by which the act was accomplished, did not "create a reasonable apprehension of death" on her mind. Such a proposition cannot be sustained upon any code of ethics or law of any people, heathen or christian. The question is, did the prisoner have such intercourse, against the *consent* of the victim of his brutish passions, and by force. If he did, then he is guilty.—*Lewis v. The State*, 35 Ala. 380; *Murphy v. The*

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State, 6 Ala. 770. If the rule prevails as contended for by the counsel for the prisoner, it would leave the guilt of the accused to be tested by the reasonableness of the apprehension of the female, as to the force employed or threatened being such as might produce death, if she did not yield the use of her person to the wicked purposes of her worst enemy.

4. The other charge asked, was also correctly refused. Under section 642 of the Penal Code, "actual penetration" is sufficient, when the act is shown to have been committed forcibly, and against the consent of the person on whom the offense was committed; even if such penetration, under such circumstances, was not sufficient at common law. Lord Hale held that penetration was sufficient.—1 Hale's P. C. 628. Lord Coke was of a contrary opinion, and held that the "two proofs" must be made.—12 Co. 36, 37. But, in Scotland, and in every country in Europe, it has been held that penetration was sufficient.—2 Bishop on Criminal Law, § 1085 (944).

Upon reason and principle, it would seem that there ought to be no doubt of the correctness of this position; and it is strange that, in any christian or civilized country, a different opinion should ever have obtained any favor or countenance.—1 East's P. C. 436, 440; *The State v. Sullivan*, Addison, 143.

The following authorities fully sustain the position, that under section 642 of the Penal Code, penetration alone is sufficient.—*Rex v. Bussen*, 1 East's P. C. 438; *Rex v. Jennings*, 4 Car. & P. 249; 1 Lewin, C. C. 93; *Rex v. Cox*, 5 C. & P. 297; 1 Moody, C. C. R. 337; *Rex v. Beekespear*, 1 Moody, C. C. R. 342; *Brooks' case*, 2 Lewin, C. C. 267; *Regina v. Allen*, 9 Car. & P. 31.

Prior to the year 1776, the weight of English authorities was in favor of the opinion of Sir Matthew Hale, as above stated, (1 East's Cr. Law, 439,) and we prefer to follow them, as they were prior to the revolution.

5. The other assignments of error may be disposed of together, so far as it is necessary to notice them in this opinion. It was erroneous for the court to allow the jury to return their verdict to the clerk, under the facts of this

case. The counsel had no authority to assent thereto, or to waive the right of a prisoner, charged with a felony, to be present when the jury delivered their verdict to the court. *The State v. Hughes*, 2 Ala. 102; 2 Hawk. ch. 47; 2 Lead. Crim. Cases, 452; *Nomague v. The People*, 1 Breese, 109; 1 Chitty's Crim. Law, 626; 1 Term R. 434; *Prine v. Commonwealth*, 6 Har. (Pa.) 103; 1 Bish. Cr. Pro. § 688; *State v. Buckner*, 25 Mis. 168; *Eliza v. The State*, 39 Ala. 693.

It was also improper to allow the jury to amend their verdict, under the circumstances shown by the record.—*Vide* authorities cited *supra*; *Brister v. The State*, 26 Ala. 108. The case last cited does not militate against the views we have taken of this case. And whenever it is allowable for a jury to make an amendment, the record should show affirmatively, in a case of felony, that the prisoner was present in court when the instruction was given to the jury to do so, and also when they returned with the verdict as corrected, and delivered it to the court.—*Vide* authorities, *supra*.

6. The counsel for the prisoner insists that this court ought to order the discharge of the prisoner from custody, on the ground that, upon the verdict as originally returned into court, no sentence could have been pronounced, and that he was entitled to judgment of acquittal thereon. We can not assent to such a proposition.—See *The People v. Perkins*, 1 Wendell, 91; *The State v. Hughes*, *supra*; *The State v. Battle*, 7 Ala. 259; *State v. Williams*, 3 Stew. 454; *Cobia v. The State*, 16 Ala. 781; *The State v. Redman*, *infra*; *Turner v. The State*, at the last term.

The proper distinction, in all such cases, seems to be, that if the jury, by their verdict, ascertain and pronounce the prisoner guilty of the offense charged, then, although the verdict is otherwise informal or imperfect, and therefore reversible, the prisoner is not entitled to be discharged upon a reversal, but may be tried again. If the verdict fails to fix the guilt of the prisoner, and the jury should be discharged without his consent, and no sentence could be legally pronounced on the verdict, then he *might* be entitled to a judgment of acquittal thereon. There are cases in which a court may set aside a verdict, and order a *venire de*

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*nov*o; but it is unnecessary for us to decide that the court could or could not have taken such a course in this case.

Upon the above cited adjudications, we hold, that the judgment is reversible, and the prisoner can be again tried on the same indictment.—*The State v. Redman*, 17 Iowa R. 330. The case of *McCauley v. The State* (26 Ala. 126) does not conflict with these views, nor overrule the cases of *Hughes v. The State*, and *Cobia v. The State*, *supra*; nor has the case of *Battle v. The State* ever been questioned by this court, though it has been at the bar, and there is no necessity which requires a review of it in this case.

The judgment of the court below is reversed, and the prisoner will remain in the custody of the sheriff until discharged by due course of law.

ALLEN (A FREEDMAN) vs. THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Burglary; what constitutes.*—Where the proof showed that the prisoner proposed to a servant a plan for robbing his employer's office by night; that the servant disclosed the plan to his employer, by whom it was communicated to the police; that the master, acting under the instructions of the police, furnished the servant with the keys of his office on the appointed night; that the servant and the prisoner went together to the office, where the servant opened the door with the key, and they both entered through the door, and were arrested in the house by the police,—*held*, that there could be no conviction of burglary.
2. *Judgment reversed, and prisoner discharged.*—Where the record sets out all the evidence connected with the alleged offense, and shows that the prisoner cannot be convicted under any indictment, the judgment of conviction will be reversed, (Penal Code, § 765,) and the prisoner ordered to be discharged from custody.

FROM the City Court of Mobile.

Tried before the Hon. H. CHAMBERLAIN.

THE indictment in this case was found on the 14th June, 1866, and charged that the prisoner, William Allen, a freedman, "broke and entered the office of Samuel Lyons, with intent to steal, in which office there was kept, at the time of said breaking and entry, goods; merchandize, or other valuable thing, for use, sale, or deposit." No objection to the indictment was interposed, and the only plea was, not guilty. "On the trial" as the bill of exceptions states, "the following facts, among others, were testified to by the witnesses on the part of the State :

"About two months previous to the alleged breaking, according to testimony of Leander Watkins, (a negro freedman,) the accused, Wm. Allen, proposed to said Watkins to join him in a robbery of Mr. Lyons' office. The plan suggested for this purpose by Allen was, that Watkins should hire himself to Mr. Lyons as a servant, and, while thus employed, should embrace the first opportunity for stealing the pantaloons of Mr. Lyons, after he had retired to bed at night, and thus procure the key of his office, and that of his safe, which would probably be found in the pants. The keys being thus obtained, they would enter the office and safe, help themselves to the money there deposited, and then return the pants, with the keys in them, to the bedside of Mr. Lyons, before he awoke in the morning, so that they would not be missed by him, nor any discovery made of the authors of the burglary and theft, or of the means by which they had been effected. After a little, Watkins disclosed to his employer, Mr. Jack Weems, this proposition of Allen's; and Weems communicated it to Mr. Lyons, the owner of the office which was the object of the alleged proposal. Lyons then communicated to the chief of the Mobile police, Stephen Charpentier, the information he had thus received, with the names of his informants. Charpentier told Lyons to 'leave the matter in his hands,' to which Lyons assented. Charpentier then ordered Richards, one of his subordinate officers, who knew Watkins, to arrest him, and bring him before him. This was done a few days afterwards, and Watkins then told Charpentier all that Allen had proposed to him. At this interview, Charpentier told Watkins he could have

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both him and Allen arrested. He also told him to keep in with Allen, and if Allen proposed the matter to him again, to tell him he would do what he proposed, and then let him (Charpentier) know it. After this, Charpentier had no further interviews or conversations with Watkins himself, but the latter communicated with Lyons, his employer, and the owner of the office, and Lyons communicated with Charpentier. Subsequent to his interview with Watkins, above described, Charpentier advised Lyons to hire Watkins, and to give him all the chances to get the keys. Watkins subsequently came to Lyons, and proposed that the latter should take him into his employment as a hired domestic; and said, *'Allen had directed him (Watkins) to take service with Lyons'*; also, that he had spoken to Charpentier, and it was all right; that he was going to follow instructions. He also presented a written recommendation of himself as a servant, with which, he said, *Allen had furnished him*. He testified that Allen had suggested and directed him to take this course, and that he told Mr. Lyons of it. Upon this, Lyons took Watkins into his employment as a domestic servant at his house, but having no connection with his office. This was about the 22d May, which was about a week or ten days after Mr. Weems first informed Lyons of what he had learned from Watkins concerning the plot against him.

"For some time after Watkins had taken service with Lyons, as aforesaid, Allen was absent from the city. During his absence, Watkins called several times at the residence of Allen to see him, but did not find him at home. After Allen's return to the city, Watkins testified he had an interview with him. Charpentier testified that, on Friday, the 8th June, Lyons came to him, told him *'all was arranged for that night'*, and gave him one of the two keys which he had to his office. *This* night, Watkins testified, Lyons gave him the key to his office, and his pants. Lyons also testified that, on Friday night, he gave Watkins one of the keys of his office, and his pants, and gave the other key of his office to Charpentier, the chief of police. Watkins testified that, *this* (Friday) night, after receiving from Lyons the key to his office, and his pants, he went to Allen's

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house, woke Allen up, got two carpet-sacks there, and he and Allen went to Lyon's office, but saw too many people there, and Allen was afraid; that they went back to Allen's house, and stayed awhile; came back to the office, when it was nearly day, but saw a man still standing there, and went off towards the market; then went to Allen's house, and left the carpet-sacks; and that he (witness) then returned to the house of his employer, Mr. Lyons, and returned the key and the pants. Lyons testified, that Watkins returned home about three o'clock Saturday morning, and told him 'Allen was afraid.'

"Charpentier, chief of police, testified that, after receiving from Lyons the notice above stated, viz., '*that all was fixed for that night,*' and getting from him one of the keys of his office, he procured the use of two rooms in the Battle house, fronting on St. Francis street, and directly across the street from the office of Mr. Lyons, which was No. 51 St. Francis. About 10 p. m., put several officers of his staff in Mr. Lyon's office. It was dark, and the blinds of the room at the Battle house were closed, but he could see. About twelve or one o'clock, he saw a boy about the size of Allen put the key in the door, but he became alarmed, probably by a noise made by a policeman with his club on the street above, and went off, leaving the key in the door. About three or four o'clock Saturday morning, a boy whom witness took for Watkins came along, and took the key out of the door.

"The next day, Saturday, the 9th June, 1866, Charpentier testified, he received a note from Mr. Lyons between four and five p. m., stating, '*The thing is fixed for to-night, the force will be strong, and the burglars well armed.*' That night he put four of his officers in the office of Mr. Lyons, and took four others with him to the room in the Battle house which he had occupied the preceding night. This night, Saturday, 9th June, Lyons testified that he gave Watkins his office key, his pants, and his gold watch, and the two keys to his safes; the other key he gave to Charpentier. This night, Saturday, 9th June, Watkins testified, his employer, Mr. Lyons, gave him the key of his office, and told him '*he had got everything fixed.*' He also gave witness his

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pantaloon, and his gold watch, and told Watkins to let Allen have the key, and let him get into the office, if disposed to do so. He took the keys, pants, and watch, and went to Allen's house. Allen was asleep, but after he was called several times, Allen woke up; witness went in. They took two carpet-sacks; left Mr. Lyon's gold watch in the front room or parlor of Allen's house, on the mantel-piece, and the pantaloons on the table; and proceeded to Mr. Lyons' office on St. Francis street. When they reached there, witness gave Allen the key of the office. Allen put the key in the door, and, witness thought, turned the bolt of the lock, but did not open the door nor go in; but, on the contrary, they both walked past the office, and down the street, leaving the key in the door. After a little, they both returned, and Allen sat down on the steps of the barber shop, the building next to the office. After awhile Allen says, 'The way is clear, let us enter.' Watkins then turned the bolt, and entered, calling to Allen to come on; and that Allen followed immediately after him into the office.

"The testimony of what occurred after the entrance of Watkins and Allen into the office, was as follows: Watkins testified that, after they had both got into the office in the manner described, Allen lit a match. He then looked through the office, to see if there was any one there. He, Watkins, found the key of the back door in the lock on the inside, and the door unlocked but latched, and he (Watkins) unlatched the back door. His employer, Mr. Lyons, the owner of the office, had given him, at the house of Mr. Lyons, and at the same time he gave him the key of the office, the gold watch, and the pants, two other keys which he stated were the keys of the two iron-safes in the office. He (Watkins) gave one of these safe-keys to Allen, and the other he retained himself. After the match had been lit, he (Watkins) put the key he had in one of the safes, but did not open it; and then went to the other, and tried it in the same manner, but in vain; and while looking around, the police entered, and arrested both him and Allen. Allen, he stated, did not go nigh either of the

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safes, nor attempt to make any use of the key given him for that purpose.

“Mr. Lyons, the owner of the office, testified that the two keys which he had given his servant, Watkins, before leaving his residence, as the keys of the safes in his office, were not such in fact, and, if they had been, neither Watkins nor Allen could have got into the safes with them; for the locks of the safes were combination locks, and no one not possessed of the secret of their combinations, could have opened them, even with the aid of the real keys themselves. Charpentier, chief of police, testified that, while he was watching the office of Mr. Lyons from the second story of the Battle house, where he and his four assistants were secreted, on Saturday night, 9th June, he saw, between two and three o'clock in the morning, two men walk by the office, stopping a little while in front of the door. They then came back, and sat on the steps of the barber shop. One of the men went to the door of the office, and went in, and then returned and said to the other ‘come in,’ whereupon they both went into the office. Witness then took the policemen, and went over to the office. He saw a light in the office, like the light of matches. He went to the door of the office, and saw there were but two men in there. He then had a light struck, and found Allen and Watkins there, and arrested them. When he went in and struck a light, he found Watkins close to the safe, and Allen close to the back door. Neither Watkins nor Allen had stolen anything. The other four policemen were concealed, as before stated, in the rear of the office, and cut off all egress in that direction, while the chief and his assistants entered in front. There was no one with Allen and Watkins, and Allen, upon being searched, had no arms, nor any dark lantern. On the way to the guard-house, Watkins was permitted to escape. Mr. Lyons, owner of the office, testified that, on this night, Saturday night, the 9th June, he did not come to town, but remained at his residence on Dauphin way; that about three or four o'clock Sunday morning, Watkins came home to the house of witness; that he was very much excited, and told witness Allen had been arrested; that being interro-

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gated on that point, witness replied, 'The police acted under my orders.' He testified that Watkins had communicated to him the plan, and that he informed the police; and Watkins testified that he acted in the matter according to the direction and suggestions of Allen. There was no evidence whatever adduced on the part of the defense, in relation to what occurred at the office; the witnesses on the part of the State, viz., Watkins, the servant of Lyons, and Charpentier, the chief of police, being the only persons, beside the accused, cognizant of what was done there. Mr. Lyons testified that there were considerable sums of money in the office at the time, belonging to him, and deposited with him by others for safe-keeping; that it is a banking office."

"The foregoing being all the testimony in the case, in relation to the alleged breaking and entering of the office, the court charged the jury, that if they believed the testimony which had been submitted to them, then the accused was guilty of breaking and entering the office of Samuel Lyons, as charged in the indictment, and they should so find in their verdict; to which charge the defendant excepted."

The jury returned a verdict of guilty, and the court thereupon sentenced the defendant to imprisonment in the penitentiary for ten years.

CHARLES H. MORSE, for the defendant, cited the following authorities: *Rex v. McDaniel*, Foster, 121-8; *Egginton's case*, 2 East's P. C. 666; *Rex v. Reane et al.*, 2 East's P. C. 734-5; *Regina v. Johnson*, 1 Car. & Marsh. 218 (41 Eng. Com. L. 123); 1 Russell on Crimes, 785-6; 1 Hawk. P. C. ch. 38; Hale's P. C. 551; 4 Bla. Com. 226.

JOHN W. A. SANFORD, Attorney-General, *contra*.—The offense was committed, when the accused unlocked the door, and entered the house with the intention of stealing. Roscoe's Crim. Ev. 323; 2 East's P. C. 487; 1 Russell on Crimes, 786. The fact that he was betrayed and entrapped by his supposed accomplice, or that the owner of the house was informed of the intended burglary, and, without the

knowledge of the accused, furnished the means of its perpetration, and placed policemen so as to arrest him, does not diminish his guilt.—1 Bishop's Criminal Law, § 344, and authorities cited; *Thompson v. The State*, 18 Indiana, 386; 23 U. S. Digest, 100.

BYRD, J.—It is unnecessary to notice all the questions discussed in the voluminous brief of the counsel. We are satisfied the prisoner is not guilty of the offense charged in the indictment, upon the evidence set out in the bill of exceptions. It is difficult to conceive how a person can be guilty of burglary, who enters a house with a key voluntarily furnished him by the owner to enter, knowing at the time that the person wishes to enter to steal. It is in effect a consent to the entry by such person, and is not even a trespass.

The witness Watkins was the servant and agent of the owner of the house in this transaction; and in this case, whatever the agent did, in conformity to his instructions and general authority, must be treated as done by his principal. If, then, the owner of the house had been in the place of Watkins, and had done what the latter did to get the prisoner into the house, certainly such an entry would not have been a trespass, much less a burglary.

The prisoner put the key in the door, and, as the witness Watkins "thought, turned the bolt of the lock." But his evidence shows that, soon afterwards, the witness himself turned the bolt, and called to Allen "to come on," and he followed the witness into the house; and as he did so without any breaking, actual or constructive, he was not guilty of burglary, however felonious may have been his intent in entering.—1 Hale's P. C. 553-4. It is somewhat like a man being robbed by his own consent, although the supposed robbers did not know of the consent.—*Reane's case*, 2 East's C. L. 734; *McDaniel's case*, Foster, 121.

But the following authorities are more in point to this case: 1 Bishop's Crim. Law, § 570 (344); *Egginton's case*, 2 East's Criminal Law, 666; *Regina v. Johnson and Jones*, 1 Car. & Marsh. 218, (41 Eng. Com. Law R. 123.) These cases are very much like this, and the principles announced

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are applicable to the facts presented by the record before us. Allen neither opened the door, nor entered the house, until he was invited to do so by the servant of the owner ; and he did no act, before or after he entered, which by our law is punishable criminally, so far as the evidence discloses ; but this does not lessen the moral depravity of his conduct. After he entered, it seems that he had not the courage even to attempt the accomplishment of his intent, and left it to be done by his comrade and instigator, Watkins, his supposed accomplice.

In the case of *Regina v. Johnson and Jones*, (*supra*,) it appears that one Cole, who was groom to Mr. Drake, met with the prisoner Jones, and they entered into conversation about the badness of trade ; and Jones said that he would not blame anybody who would rob another in these *hard times*, and asked Cole where his master kept his plate ; and being told, said that, if he would let him into the house, he would give him £500. They agreed to meet again. Cole immediately told a policeman what had passed, and, his master being out of town, agreed to act under the directions of the police, in order to detect the prisoner Jones. Cole, Jones, and Johnson, met, and it was arranged that Cole should get the servants out of the way, and admit the two prisoners. In the meantime, several policemen were secreted in the house. Cole went and fetched Johnson to the house, at night, and lifted the latch of the stable-yard door, and a little gate, and also the kitchen-door, and let Johnson in, and followed him into the back kitchen. Johnson then went up stairs, and as he was about to open the door of the room in which the iron chest was deposited, the police seized him before he had done *anything* ; and soon after Cole brought in the other prisoner in the same way, who went into the back kitchen, and took from it the plate basket containing the articles of plate mentioned in the indictment.

Maule, J., in summing up, (Rolfe, B., being present,) said : "It appears to me that, on the present occasion, according to the evidence, there was no such breaking as to constitute the crime of burglary. Cole, the groom, it is true, appeared to concur with the prisoners in the commis-

sion of the offense. But, in fact, he did not really concur with them; and he, acting under the directions of the police, must be taken to have been acting under the directions of Mr. Drake, the prosecutor." And it was held that neither Johnson nor Jones was guilty of burglary. This case is stronger in this, *that* here the owner actually gave the instructions to the servant, as also did the chief of police in part,

In *Egginton's case*, the prisoners applied to a servant of one Boulton, to aid them in robbing the house of his employer. The servant consented, and immediately gave information to Boulton; and he consented that the servant might *carry on the business*, and he (Boulton) *would bear him harmless*. The prisoners went at night, and the servant opened the door in the front yard. The prisoners entered the rooms where the plated business was carried on, and bolted the door; and then broke open the counting-house, which was locked, and the desks, which were also locked, and took from thence the ingots of silver guineas. They then went to the story above, into a room where the plated business was carried on, and broke the door open, and took from thence a quantity of silver, and returned down stairs, when one of them unbolted the door at the bottom of the stairs, which had been bolted on their going in, and went into the middle yard, where all but one were arrested by the persons placed to watch them. "On this case, two points were made for the prisoner. First, that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and that the acts of Phillips (the servant) were his acts. Secondly, that if the facts proved amounted to a felony, it was but a simple larceny, as the building broke into was not the dwelling-house of any of the persons whose house it was charged to be; and that there was no breaking, the door being left open. After conviction, the case was argued before all the judges in the exchequer chamber; and for the reasons above stated, all the judges agreed that the prisoners were not guilty of the burglary."

It will be seen that one of the reasons, and the first assigned, was, that no felony was proved, as the whole was

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done with the knowledge and assent of Mr. Boulton, and that the acts of Phillips were his acts.

2. The record in this case shows, that the only witnesses who were present at the time of the entry of the prisoner into the office on the night of the 9th June, 1866, were examined on the trial, and that all of their evidence "in relation to the alleged breaking and entering the office of Samuel Lyons", is set out in the bill of exceptions; and as that evidence clearly shows that the prisoner cannot be convicted on the indictment, or of any other offense, under the law as herein announced, we deem it our duty upon this record, and the authority conferred on this court by section 765 of the Penal Code, to reverse the judgment of the court below, and order the discharge of the prisoner from custody upon the indictment in this cause.

MOUNTAIN (A FREEDMAN) vs. THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Sufficiency of verdict.*—Under an indictment for burglary, a verdict in these words, "We, the jury, find the accused guilty of burglary, and find that the offense was committed since the first day of June, 1866, by agreement of counsel," is sufficient. (BYRD, J., *dissenting*.)
2. *Admissibility of confessions and accompanying acts.*—Where the prosecutor testified, that the prisoner, being carried to his house by a policeman, "then and there pointed out to him and said policeman the way he had broken into the house, and acknowledged he had taken said property from there, and that he had entered the house by lifting the door from its hinges"; while another policeman testified, that having arrested the prisoner on suspicion, and finding on his person articles supposed to have been stolen, "he promised that he would be released, if he would go and point out where he had got the property," that the prisoner agreed to do so, and was sent to the prosecutor's house for that purpose; and the court thereupon excluded the confessions from the jury on motion of the prisoner, "but refused to exclude the acts of the defendant in connection with said confession,"—*held*, that there was nothing in this action of the court of which the prisoner could complain.

FROM the City Court of Mobile.

Tried before the Hon. H. CHAMBERLAIN.

THE indictment in this case, which was returned into court on the 14th June, 1866, charged that the prisoner, Samuel Mountain, a freedman, "broke and entered into the dwelling-house of Jim Smith, with intent to steal." "On the trial," at the same term, as the bill of exceptions states, "Jim Smith, a witness for the State, testified, that sometime about the — day of June, 1866, before the finding of the indictment, and while he was in the guard-house, his dwelling-house in Mobile county was broken into, and robbed of several articles of clothing, jewelry, and other property, which said articles he identified in the hands of the police. Upon a cross-examination, he stated, that a policeman brought the defendant, Sam. Mountain, to his house; and that Sam. then and there pointed out to him and said policeman the way he had broken into his house, and acknowledged he had taken said property from there, and that he had entered the house by lifting the door from the hinges. C. Latham, a policeman, being sworn as a witness for the State, testified that he had arrested defendant near the house of Smith, at night, and taken from him the property claimed by Jim Smith, and the same mentioned by him in his testimony in this case; that it was on the same night the house was entered. Being cross-examined by defendant's counsel, he stated, that he arrested the prisoner at a late hour of the night, on suspicion of stealing the articles he had in his possession; that he had promised the boy, that if he would go and point out where he had got the property, he would be released, which defendant agreed to do; that he did not go with the defendant to the place, but sent him in custody of another officer, the next day or day after. It was admitted that the policeman was not authorized to make any promise to release the defendant. The State here closed its evidence; whereupon defendant's counsel moved the court to strike out the evidence of Jim Smith, so far as it related to the confession, and acts of defendant in connection with his confession; which said motion was refused by the court as to the acts of the defend-

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ant, and sustained as to the confession itself. Defendant therefore prays that his bill of exceptions be allowed, and assigns the overruling of said motion as error, and prays that the same may be revised by the supreme court. No exception was taken as to the charge of the court, and no question reserved other than as above stated; and this bill of exceptions is now signed and sealed", &c.

The verdict of the jury is copied in the opinion of the court. The court sentenced the defendant to confinement in the penitentiary for four years.

No counsel appeared in this court for the prisoner.

JNO. W. A. SANFORD, Attorney-General, for the State, cited 1 Phil. Ev. 554-5, and note; 1 Greenl. Ev. §§ 229-31; *Brister v. The State*, 26 Ala. 108-28; *State v. Motley and Blackedge*, 7 Rich. Law, 327; 2 Bailey, 67; 9 Pick. 496; 5 Rich. 391.

A. J. WALKER, C. J.—After some hesitation, we decide that the singular verdict in this case is sufficient. The verdict is in the following words: "We, the jury, find the accused, Samuel Mountain, guilty of burglary, *and find that the offense was committed since the first day of June 1866 by agreement of counsel.*" We intentionally leave the last clause without punctuation, as it is in the transcript, and as we suppose it to be in the original. Giving it the only punctuation which avoids absurdity, it will read thus: "and find that the offense was committed since the first day of June, 1866, *by agreement of counsel.*" Thus punctuated, the sense is the same as if the clause read: "and we find, *by agreement of counsel*, that the offense was committed since the first day of June, 1866." The first clause of the verdict constitutes a general verdict, which, standing by itself, is sufficient under our decisions.—*Nancy v. The State*, 6 Ala. 483; *Oxford v. The State*, 33 Ala. 416; *Bramlett v. The State*, 31 Ala. 376; *Prince v. The State*, 35 Ala. 367; *Noles v. The State*, 25 Ala. 31; *Harrell v. The State*, 26 Ala. 52; Chitty on Crim. Law, 636; 1 Bishop on Cr. Pr. 829.

This sufficient general verdict is not vitiated by the find-

ing, that the offense was committed after the first day of June. The object of this finding obviously was, to meet the fact that a new Penal Code went into force on the first day of June. The prisoner might have been guilty, as found in the general verdict, and yet not obnoxious to punishment under the new Penal Code; hence the propriety of the latter clause of the finding.

2. We understand from the bill of exceptions, that the court excluded the evidence of the defendant's confessions, but admitted proof of his acts. We see no objection to this ruling. It was certainly as favorable to the accused as the law would warrant, and there is no ground of complaint by him on error.

A careful examination has not enabled us to discover any error in the record, and we must affirm the judgment.

BYRD, J.—I hold, that the verdict is neither good as a general, nor as a special one, and therefore the cause should be reversed.

MAGRUDER vs. THE STATE.

[INDICTMENT FOR LARCENY OF MULE.]

1. *Punishment of horse-stealing; repeal of special by subsequent general statute.*—The act approved October 7, 1864, (Session Acts, 1864, p. 19,) so far as it relates to the punishment of horse-stealing, or the larceny of any of the animals therein specially named, is not repealed by the subsequent act, approved December 15, 1865, (Session Acts, 1865, p. 116,) which provides for the punishment of grand larceny and other offenses therein named; the maxim applies, *Generalia specialibus non derogant*.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

THE indictment in this case was returned into court on the 9th June, 1866, and charged, that the defendant, Peter

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Magruder, before the finding of the indictment, "to-wit, on the 15th day of February, 1866, feloniously stole, took, and carried away, a mule, of the value of one hundred dollars, the property of W. R. Magruder." The trial was had at the same term, on issue joined on the plea of not guilty. The verdict of the jury was, "that they find the defendant guilty as charged in said indictment, and that they sentence him to be imprisoned in the penitentiary for the term of ten years." The defendant moved in arrest of judgment, "on the ground that there is no law by which the court can render judgment against him." The court overruled the motion in arrest, and rendered judgment according to the verdict. The minute-entry recites that, "questions of law having arisen for the consideration of the supreme court, it is ordered that the execution of the sentence be suspended until sixty days after the commencement of the next ensuing term of the supreme court"; but there is no bill of exceptions in the record, nor any writ of error.

E. Y. FAIR, for the prisoner.—The act of October 7, 1864, was repealed by the act of December 15, 1865.—*State v. Whitworth*, 8 Porter, 434; 1 Stewart, 506; 5 Ala. 666, 477; 1 Bishop on Criminal Law, §§ 202, 204, 205, 207, 208.

JNO. W. A. SANFORD, Attorney-General, *contra*.—The law punishing horse-stealing, approved Oct. 7, 1864, was in force on the 15th of February, 1866, when the offense was committed. It was not repealed by the act of Dec. 15th, 1865. The repeal of statutes by implication is not favored by the courts.—*Stewart George v. Skeates*, 19 Ala. 738; *Rawls v. Kennedy*, 23 Ala. 240. That it was not the intention to repeal the act of Oct. 7, 1864, by the act of Dec. 15th, 1865, is shown by the enactment of a law expressly repealing it on the 23d of February, 1866.—Penal Code, pp. 7-8. This act provides that the repeal of the statutes therein named shall not affect any prosecutions then pending, or thereafter commenced, for any offense previously committed. Therefore, the law authorizes the conviction of the accused.

JUDGE, J.—The act of October 7, 1864, provides for the punishment of any person, who shall be found guilty of the larceny of any “horse, mare, gelding, colt, filly, or mule”; or who shall be guilty of any “robbery, burglary, or arson,”—with death by hanging, or imprisonment in the penitentiary not less than ten years, at the discretion of the jury trying the case.—Acts, 1864, p. 19. The act of December 15, 1865, provides, that any person who shall be guilty of the offense of grand larceny, arson, or burglary, on conviction thereof, shall suffer death, or be imprisoned in the penitentiary not less than five years, at the discretion of the jury trying the case.

It is a well settled doctrine in relation to the construction of statutes, that where the intention of the legislature is not apparent to that purpose, the general words of another and later statute shall not repeal the particular provisions of a former one; the maxim of the law being, “*generalia specialibus non derogant*.” “When the law descends to particulars, such more special provisions must be understood as exceptions to any general rules laid down to the contrary; and the general rules must not (*vice versa*) be alleged in confutation of the special provisions.”—Dwarris on Statutes, 9th Law Library, m. p. 659, (766,) and authorities there cited. See, also, *Mobile & Ohio R. R. Co. v. The State*, 29 Ala. 583.

An application of this rule of construction to the two statutes above cited shows, that in so far as they relate to the subject of larceny, each can stand and be enforced. The first contains special provisions relating to the larceny of a particular species of property, which must be considered as exceptions to the provisions of the latter statute on the same subject; and such was the state of the law on the identical question, before the adoption of the new Penal Code. By section 3173 of the Code of 1853, punishment was provided for the offense of grand larceny generally; while by section 3180, a higher grade of punishment was provided for the larceny of “any horse, mare, or gelding, foal, or filly, ass, or mule.”

It results that the act of October 7, 1864, as applicable to the case of the prisoner, was of force at the date of the

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commission of the offense, and at the time of his conviction and sentence; for the act to establish a new Penal Code, in repealing the act of October 7, 1864, contained a saving clause as to all prosecutions then pending, or which might be thereafter commenced, for any public offense before that time committed, or which might be thereafter committed at any time prior to the day on which the new Penal Code should go into effect; and the new Penal Code did not go into effect until the first day of June, 1866.

The prisoner was, therefore, rightfully convicted, under the act of October 7, 1864; and there being no error in the record, the judgment of the city court must be affirmed.

TEMPE (A FREEDWOMAN) vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Presumption in favor of judgment.*—Where the indictment describes the defendant as a freedman, and alleges that the offense was committed before the finding thereof; while the record does not show whether the offense was committed while the defendant was a slave, or after he became free,—the appellate court will presume, when necessary to sustain the judgment of the court below, that the offense was proved to have been committed after the abolition of slavery.
2. *General criminal statutes applicable to freedmen.*—For offenses committed by freedmen since the abolition of slavery in this State, they may be indicted, convicted, and punished, under the general criminal statutes applicable to all other persons, although these statutes were not applicable to them while slaves.
3. *Proviso in repealing criminal statute as to prior offenses.*—The proviso to the 5th section of the “act to establish a new Penal Code,” approved the 23d February, 1866, (Session Acts, 1865–6, p. 124,) excepts from the operation of the repealing clause of that section all prosecutions for offenses committed prior to the day on which said new Penal Code went into operation, (June 1st, 1866,) and leaves such offenses to be punished by the former laws applicable to them.
4. *Sufficiency of indictment in description of person slain, and as affected by duplicity.*—In an indictment for murder, “an infant child, name to the grand jury unknown,” is a sufficient description of the person slain; and it is no objection to the indictment, that it describes the

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child, in different counts, as the infant child of the prisoner, and as an infant child generally, not naming its mother or father; nor that the murder is alleged, in different counts, to have been committed by different means or instruments.

5. *Murder; what constitutes.*—If a mother intentionally kills her infant child, who is incapable of any resistance, by beating it over the head with an instrument calculated to produce death, the law would imply malice on her part; although it might not imply malice, if the child was capable of taking her life, and was attempting to take it with means adequate to the end, and she killed it to preserve her own life.
6. *Presumption in favor of affirmative charge.*—An affirmative charge of the court, which, upon any supposable state of facts, would be correct, will be presumed to have been justified by the evidence, unless such presumption is rebutted by the record.

FROM the Circuit Court of Choctaw.

Tried before the Hon. JOHN MOORE.

The indictment in this case was returned into court on the 8th March, 1866, and contained four counts. In the first count, the prisoner was described as "Tempe, if known by any other name, to the grand jury unknown, a freed-woman"; and in the other counts no descriptive words were added to the christian name. The first count averred, that she unlawfully, and with malice aforethought, "killed an infant child, name to the grand jury unknown, by striking it with a stick and club"; the second, that she killed "an infant child, name to the grand jury unknown, by striking and beating it"; the third, that she killed "an infant child, name unknown to the grand jury, by exposing said infant to the cold and weather"; and the fourth, that she killed "her infant child, name unknown, by want of care and attention, and by leaving it, and refusing to care and protect the same." On the trial of the cause, at the September term, 1866, the prisoner moved to quash the indictment, "on the ground that there is no law authorizing her trial, conviction, and punishment"; which motion the court overruled, and the prisoner excepted. The prisoner demurred to the indictment, "on the ground that the first count therein charges her with having killed 'an infant child, name to the grand jury unknown', without any further description as to identity; while the fourth count charges

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her with having killed 'her infant child', and the second and third counts charge her with having killed 'an infant child, name to the grand jury unknown', without any further description as to identity." The court overruled the demurrer, and the prisoner excepted; and issue was then joined on the plea of not guilty.

The bill of exceptions does not set out any of the evidence adduced on the trial; but it states that "it was admitted by the State's attorney, on the trial, that the defendant was a slave up to the time of the surrender"; and that "after the court had charged the jury, the defendant asked the court to give the following charge: 'Although the jury may believe, from the evidence, that the defendant intentionally killed her infant child, they cannot find her guilty of murder, unless they believe she did it maliciously'." The court gave this charge, "but with this explanation—that if they believed, from the evidence, that the defendant intentionally killed her infant child, by beating it over the head with an instrument calculated to produce death, the law implied malice"; to which qualification of the charge the defendant excepted.

The verdict of the jury was, "guilty of murder in the second degree." The prisoner moved in arrest of judgment, "because the verdict of the jury was returned into court, received and recorded, and the jury discharged, in the absence of the prisoner's counsel, without their having given their previous consent thereto, and without having an opportunity to poll the jury before they were so discharged." The court overruled the motion in arrest, "because the verdict of the jury was returned while the court was actually in session, and not during a recess, and the prisoner herself was present at the time, though her counsel were not"; to which ruling the prisoner also reserved an exception. The court sentenced the prisoner to imprisonment in the penitentiary for ten years.

MORSE & ROBERTS, for the prisoner.—1. The prisoner was once a slave, and was set free by the ordinance of the convention on the 22d September, 1865. No provision was made by the convention for the punishment of offenses

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committed by or upon persons of that class, but the duty was devolved and enjoined on the next general assembly; and no law was passed on the subject until the act of February 23d, 1866, which did not go into effect until the 1st June following. There was, then, no law in force, under which the prisoner could be indicted and punished.—*Chaney v. The State*, 31 Ala. 345, and cases there cited.

2. The indictment is fatally defective for duplicity, and for uncertainty in description.—2 Archb. Crim. Pl. 206-7, and notes; Barbour's Crim. Law, 318.

2. The charge asked ought to have been given, without qualification. Malice is an essential ingredient of murder. The fact that a mother kills her infant child intentionally, does not raise the presumption of malice; she may have thus killed it under circumstances which would preclude the idea of malice.—Arch. Crim. Pl. 211-12, and notes.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. An indictment may contain several distinct counts for the same offense.—1 Bish. Crim. Pro. § 182. Therefore the indictment in this case was properly drawn.—*Mayo v. The State*, 30 Ala. 32; *Cawley v. The State*, 37 Ala. 152.

2. The criminal laws of the State operate alike upon all inhabitants, without regard to race.—*Eliza v. The State*, 39 Ala. 693.

3. The presence of the accused, when the jury returned their verdict, was necessary; but the absence of the counsel at that time affords no reason for the reversal of the judgment of the court below.—*Crusen v. The State*, 10 Ohio, 288; *Sutcliffe v. The State*, 18 Ohio, St. R. 469.

4. It was the duty of the court, in giving the charge requested, to explain it, and, by giving additional instructions, "to prevent misunderstanding or misapplication of it."—*Morris v. The State*, 25 Ala. 57-8.

BYRD, J.—The counsel for appellant contends, that there was no law in force in this State authorizing the punishment of freedmen for offenses committed by them at the time the offense charged was perpetrated. It does not appear from the indictment, or the bill of exceptions,

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when the offense was committed, whether before the prisoner was set free or afterwards; and as the bill of exceptions does not purport to set out the evidence introduced on the trial, we must make every legitimate intendment in favor of the rulings of the court below, and the judgment thereof. The indictment was found and filed at the March term of the circuit court for the year 1866. The indictment describes the appellant as "a freedwoman"; but this does not necessarily imply that she committed the offense with which she is charged before or after she became free. But, in order to sustain the judgment of the court, we must presume, upon the state of this record, that she committed the offense prior to the finding of the indictment, and after she became free.

2. This court has held, that freedmen were criminally responsible, under the laws applicable to other free persons of color; and such persons being liable to prosecution for the commission of the offenses mentioned in sections 3080 and 3081 of the Code, and to the punishment prescribed therein, we cannot give our assent to the position taken by appellant's counsel. We conceive that the case of *Eliza (a freedwoman) v. The State*, decided at January term, 1866, is decisive of this question.—39 Ala. 693.

3. It is contended, also, that the act approved February 23, 1866, adopting the Penal Code, repealed the law punishing this offense, which was in force at the time it was committed; and therefore the appellant could not be convicted and sentenced under this indictment. But the saving clause of that act is a reply to the position taken by counsel.

4. It is insisted that the indictment is defective, for uncertainty in description, and for duplicity. The indictment is sufficiently certain, as to matter of description, under the provisions of the Code; and the objection of duplicity is not sustainable, as will appear by reference to the Code, and the cases of *Mayo v. The State*, 30 Ala. 32; *Cawley v. The State*, 37 Ala. 152, and *Cheek v. The State*, 38 Ala. 107, and authorities therein cited. We are of opinion that the words "infant child, name to the grand jury unknown," is a sufficient description in an indictment of

a human being upon whom the offense of *murder* may be committed.

5-6. The explanatory charge given by the court could, upon a state of facts that might have existed, be vindicated; and as the facts in evidence on the trial are not set out in the record, we must presume that facts were in evidence which authorized the court to give that charge. If a mother should *intentionally* kill her infant child, who was incapable of any resistance, by beating it over the head with an instrument calculated to produce death, the law would imply malice; although it *might* not if a mother should *intentionally* kill her infant child, who was capable of taking her life, and was attempting to take it with means adequate to the end, if she did so under the necessity of preserving her own life. A party complaining of error must show it affirmatively; otherwise, the ruling of the court below must be affirmed.—*Morris v. The State*, 25 Ala. 57; *Miller v. Jones*, 29 Ala. 174; *Eskridge v. The State*, 25 Ala. 30; *Butler v. The State*, 22 Ala. 43; *McElhaney v. State*, 24 Ala. 71.

This disposes of all the material points raised in the argument of appellant's counsel; and upon a careful examination of the record, we have been unable to detect any error. The judgment of the circuit court, therefore, must be affirmed, and the sentence of the court below carried into execution as prescribed by law.

SMITHERMAN vs. THE STATE.

[INDICTMENT FOR LIVING IN ADULTERY OR FORNICATION.]

1. *Acts subsequent to indictment; admissibility of.*—Under an indictment for living in adultery or fornication, (Code, § 3231,) evidence tending to show criminal conduct between the parties, subsequent to the finding of the indictment, is, *prima facie*, irrelevant; and when offered, its relevancy must be shown by its connection with other evidence already adduced, or its proposal with other relevant evidence afterwards to be adduced.

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2. *Admission of irrelevant evidence.*—The admission of evidence which is, *prima facie*, irrelevant, and the relevancy of which is not affirmatively shown, will work a reversal of the judgment, unless the record shows that no injury resulted from its admission.

FROM the Circuit Court of Bibb.

Tried before the Hon. JOHN MOORE.

THE indictment in this case was found on the 20th April, 1866, and charged "that William Smitherman, a man, did live with Margaret Strong, a woman, in a state of adultery or fornication." "On the trial," at the October term, 1866, as the bill of exceptions states, "when the case was called, the State introduced Samuel Frazer as a witness, who testified that, on the 20th April, 1866, one James Smitherman resided, with his family, on a tract of land in said county which belonged to said witness, and Margaret Strong resided with him; that said witness was at the house of said James Smitherman, about once a week, for two or three months next ensuing the 20th April, 1866, and occasionally saw William Smitherman there during that time; and that William Smitherman told him, after said 20th April, 1866, that he had started to Mississippi with Margaret Strong, but found the waters too high to travel, and returned; all of which was subsequent to the 20th April aforesaid. The defendant objected to each sentence of this evidence separately; but his objections were overruled, and the evidence allowed to go to the jury; to which the defendant excepted."

HEFLIN & McCRAW, for the prisoner.

JNO. W. A. SANFORD, Attorney-General, *contra*.

JUDGE, J.—The evidence admitted against the objection of the defendant, related exclusively to transactions which occurred subsequent to the finding of the indictment. In prosecutions like the present, evidence of this character is, *prima facie*, irrelevant; and, when offered, its relevancy should be shown by its connection with acts already in evidence, or its proposal with facts subsequently to be established. If its relevancy be not shown, it is error to

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permit it to be introduced, unless the record affirmatively shows that the defendant could not have been injured by it, which is not shown by the record in this case. As to the relevancy of such evidence, in cases like the present, and the weight to which it may be entitled, see the very clear and satisfactory opinion of GOLDTHWAITE, J., in *Lawson & Swinney v. The State*, 20 Ala. 65. See, also, *Shepherd's Digest*, 616, § 468.

Judgment reversed, and cause remanded.

GABRIEL (A FREEDMAN) vs. THE STATE.

[INDICTMENT FOR LARCENY OF MULE.]

1. *Sufficiency of indictment.*—An indictment which, in one count, charges that the defendant “did steal a mule, the personal property of J. L.”, and in another count that he “did steal a horse, mare, gelding, colt, filly, or mule, the personal property of J. L.”, substantially conforms to the provisions of the Code, and is sufficient.
2. *Variance as to ownership of stolen property.*—Under an indictment against a freedman for the larceny of a mule, alleged to be the property of *J. L. Terrell*, the prisoner's confession that he had taken “*Mass' Lee's mule*”,—is not competent evidence, without proof of the identity of *J. L. Terrell* as “*Mass' Lee*”; and the admission of such confession is an error which will work a reversal of the judgment, although the bill of exceptions states that the defendant was on trial for the larceny of a mule, “the property of *Lee Terrell*”, and no specific objection was made to the evidence on the ground of variance.
3. *General objection to evidence.*—A general objection, not specifying any particular ground, is sufficient to exclude evidence which, as applied to the pleadings in the cause, is illegal on its face; as in a case of variance.

FROM the Circuit Court of Marengo.

Tried before the Hon. JAMES COBBS.

THE indictment in this case was found on the 24th March, 1866, and contained two counts; the first count charging

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that the defendant, who was described as "Gabriel, a freedman", "did steal a mule, the personal property of J. L. Terrell"; and the second, that he "did steal a horse, mare, gelding, colt, filly, or mule, the personal property of J. L. Terrell." The defendant demurred to the indictment, but without specifying any grounds of demurrer, so far as the record discloses. The court overruled the demurrer, and issue was then joined on the plea of not guilty. On the trial, at the special November term, 1866, the following bill of exceptions was reserved by the defendant :

"On the trial of this cause, Gabriel, the defendant, being on trial upon an indictment for the larceny of a mule, the property of Lee Terrell, F. N. Kitchell, a witness for the State, testified as follows : Some two months before the last of September, or the first of October, 1865, witness being superintendent on the plantation of Lee Terrell, near Dayton in said county, drove the defendant from the plantation, and ordered him never to return. Whilst on the place, defendant plowed a one-eyed mule regularly. On Saturday night, on or about the last of September, or the first of October, 1865, the mule, which was the property of Lee Terrell, was in the pasture, and was missing from the pasture the next morning. The next evening, which was Sunday, witness received information that, if he would go to Demopolis, he would hear something about the mule. On Tuesday following, he went to Demopolis, and found the defendant in the calaboose, or guard-house, and had a conversation with him. The State then offered to prove the defendant's declarations to the witness. The court suspended the examination, and asked the witness under what [circumstances?] the declarations of the defendant, if any, were made ; whether any promises or assurances were made or offered to him, or whether any threats were made to him, to induce him to make any statements, or for any purpose. The witness answered, that he found the defendant in the guard-house, and two or three Federal soldiers, with guns and bayonets, standing guard in front of the door ; that he did not know the cause of the arrest ; that no promises of favor, or assurances of any kind, were made to the defendant by any one, so far as he knew ; that

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no threats were made, so far as he knew—none were made in his presence, nor was any inducement of any kind held out to him, so far as he knew; and that the conversation was commenced by his asking the defendant how he came to be there. The court then permitted the defendant's counsel to ask the witness questions, touching the circumstances under which the defendant made the statements in said conversation; to which the witness replied as stated above. The court then permitted the declarations to go in evidence to the jury, which were as follows: The defendant said to witness, *'that he was in there for taking Mass' Lee's mule; that he had taken the mule on Saturday night to ride to Demopolis on business, and was going to carry the mule back.'* The defendant, by his counsel, objected to the admission of said declarations as evidence; but the court overruled the objection, and allowed the evidence to go to the jury; to which the defendant excepted. It was in evidence, also, that the mule had never been recovered; that Lee Terrell was absent, and that said witness did not give permission to any one to take the mule. The testimony of this witness was all the evidence in the cause, and his testimony is stated in full."

After conviction, the defendant moved in arrest of judgment, on account of the insufficiency of the verdict, and because "the count under which the defendant was supposed to be convicted does not correspond with the provisions of the statute." The court overruled the motion in arrest, and sentenced the defendant, according to the verdict, to ten years imprisonment in the penitentiary.

J. W. McRAE, for the prisoner.

JNO. W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—Under the provisions contained in chapter seven, title two, part four, of the Code, the indictment is sufficient.

2. The court, on the trial, as shown in the bill of exceptions, admitted, against the objection and exception of the prisoner, the following declaration of the accused as evidence, to-wit: "The defendant said to the witness, he was

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in there for taking Mass' Lee's mule; that he had taken the mule on Saturday night, to ride to Demopolis on business, and was going to carry the mule back." The prisoner was indicted for stealing a mule, the property of J. L. Terrell. All the evidence is set out in the record, and there is no evidence tending to show that "Mass' Lee" and J. L. Terrell are the same person. We cannot judicially know, nor could the jury legitimately presume from the evidence, that they were the same person.

3. The evidence objected to, being illegal, should have been excluded by the court. It is evident that the prisoner had in view the objection to its admissibility on the ground that the confession was not voluntary. But the objection is general, and we do not feel authorized to limit the extent of the same. A general objection to the admissibility of evidence is sufficient, if the evidence is illegal upon its face, when applied to the pleadings in the cause. *Cunningham's Ex'r v. Cochran and Estelle*, 18 Ala. 480.

If the State had proposed to prove, or had proved, that "Mass' Lee" and J. L. Terrell were the same person, then the evidence would have been admissible. But, in the absence of such proof or proposal, the evidence was clearly inadmissible. We are satisfied that, upon the facts shown in the bill of exceptions, the declarations of the accused were voluntary, and on that ground should have been admitted, if there had been no valid objection, as above shown.

As the other questions raised by the brief of counsel, may not arise again on another trial, it is unnecessary to express any opinion upon them.

For the error pointed out, the cause must be reversed and remanded, and the prisoner remain in custody until discharged by due course of law.

MICHAEL vs. THE STATE.

[INDICTMENT FOR ASSAULT AND BATTERY.]

1. *State laws not suspended during late war.*—The State laws, civil and criminal, were not suspended during the late war between the United States and the Confederate States; consequently, a citizen had no right, during that time, to redress his injuries by force, and is criminally responsible for such illegal acts.
2. *Plea of pardon.*—If the prisoner in a criminal case, after pleading pardon, pleads not guilty, and goes to trial on the latter plea without objection, and the jury return a verdict of guilty against him, it is not error for the court to give judgment for the costs against him.
3. *Acceptance of pardon.*—A person who was under indictment on the 13th February, 1866, when the governor published his proclamation of amnesty and pardon, and who failed to signify his acceptance of the proffered pardon before the repeal of the law under the authority of which said proclamation was published, cannot now claim the benefit of it.

FROM the Circuit Court of Lawrence.

Tried before the Hon. WM. B. WOOD.

THE indictment in this case was found at the fall term, 1863, and charged the defendant, William Michael, with an assault and battery on Mrs. Martha J. Powell. The *capias* was not executed until the 31st January, 1866. At the spring term, 1866, the cause was continued by the State. At the September term, 1866, the defendant interposed two pleas, which are thus set out in the record: "And the said defendant, in his own proper person, protesting that he is not guilty in manner and form as charged in said indictment, says that the said offense, so charged in said indictment, is charged as having been committed between the 13th day of April, 1861, and the 20th day of July, 1865; and that by the proclamation of the governor of Alabama, purporting to be issued on the 13th day of February, 1866, full amnesty and pardon was granted to this defendant for said offense so charged in said indict-

ment, and he is not now liable to be prosecuted for said offense as charged in said indictment ; and this he is ready to verify. Wherefore he prays judgment. And for further plea in this behalf, pleaded by leave of the court here, the said defendant says, that he is not guilty in manner and form as charged in said indictment ; and of this he puts himself upon the country." On the trial, at the same term, the judgment-entry recites that issue was joined on the defendant's pleas.

"On the trial," as the bill of exceptions states, "the State introduced evidence tending to show that the defendant and Mrs. Powell, upon whom the assault is alleged to have been committed, had a controversy about some plank ; that the defendant went to Mrs. Powell's, and demanded the plank as his property ; that Mrs. Powell refused to give it up, and claimed it as the property of her husband, who was absent from home in the Confederate States army ; that the plank had been taken from an old house, which had once belonged to the defendant, and put up by Mrs. Powell in her smoke-house ; that the defendant once owned the land on which said old house was built, and had sold it, but had reserved the house ; that after having demanded the plank from Mrs. Powell, the defendant went again to her house, on or about the last day of December, 1862, for the purpose of taking the plank and carrying it away ; that a scuffle thereupon ensued between him and Mrs. Powell about the possession of the plank, he trying to take it away, and she trying to prevent him ; that she was hurt in the scuffle on her wrist, and struck on the head by the defendant ; that both of the parties were very much enraged during the scuffle ; and that the defendant succeeded in taking and carrying away the plank, in spite of Mrs. Powell's resistance. The testimony on the part of the State having here closed, the defendant introduced evidence tending to show, that the plank belonged to him, and Mrs. Powell had taken it, without his leave, and put it in her smoke-house ; that in trying to keep him out of the smoke-house, she bumped her head against the door, and bruised it ; that she got in the way while he was pitching the plank out of the door, and one of the planks

grazed her wrist; and that there was no other striking done than this. The defendant here closed his evidence.

“The court then charged the jury as follows :

“1. That the least striking of another, in a rude and angry manner, was an assault and battery ; that civil law did exist in this State, from the 13th day of April, 1861, to the 20th day of July, 1865, though it was somewhat obstructed ; that the defendant had the right to go to Mrs. Powell, and demand his plank of her, but had no right to go there and take it away by force ; that, if she would not give it up, he must resort to his remedy at law to get it ; that Mrs. Powell, by herself, her children, and servants, might legally resist the defendant’s attempt to carry off the plank by force, by every means in her power ; that if she was struck and injured by the defendant in her effort to prevent him from taking and carrying off the plank, this was an assault and battery, for which the defendant could be convicted, though the offense was a misdemeanor, and was committed between the 13th day of April, 1861, and the 20th day of July, 1865 ; and that the court would decide the plea of pardon.

“2. That the jury might, on this indictment, find the defendant guilty of an assault and battery, and fine him from one cent to two thousand dollars, notwithstanding his plea of amnesty and pardon, which was a plea addressed to the court.

“3. That the defendant’s plea of amnesty and pardon to this indictment did not admit his guilt, so as to preclude him from the benefit of his plea of not guilty ; but it was a plea for the court, and not for the jury ; and that all the jury had to do on that plea was to find that the offense was committed, if committed at all, within the time covered by the governor’s proclamation, granting amnesty and pardon to such offenses committed between the 13th day of April, 1861, and the 20th day of July, 1865, and certify these facts to the court in their verdict ; and that the court, taking judicial notice of the governor’s proclamation, would decide whether or not the plea of pardon was sustained.”

The defendant excepted to each of these charges, and then requested the court to charge the jury—

“1. That there was no civil government in this State, from the 13th day of April, 1861, to the 20th day of July, 1865; and that if there was no civil government in the State during that time, then the citizen was remitted, during that time, to his original rights, except so far as the same might be controlled by military law.; and that under such a state of things the defendant was authorized to take his remedy as to the planks into his own hands.

“2. That if the jury find the defendant's plea of amnesty and pardon to be true, then they cannot fine him at all in any sum of money.

“3. That if the jury find the offense was committed between the 13th day of April, 1861, and the 20th day of July, 1865, they cannot convict the defendant.”

The court refused to give each of these charges as asked, and the defendant excepted to their refusal.

The verdict of the jury was in these words: “We, the jury, find the defendant guilty, and assess a fine of \$379 $\frac{3}{4}$; and we further find that the offense was committed between the 13th day of April, 1861, and 20th day of July, 1865, within the time of the governor's proclamation.” The judgment of the court is as follows: “It is therefore considered by the court, that the plea of amnesty and pardon of the defendant is sustained, and the said defendant discharged of said fine so assessed by the jury aforesaid; and it is further considered by the court, that the defendant be discharged upon the payment of the costs in this prosecution.”

THOS. M. PETERS, for the defendant.—1. The governor of this State has the power to grant “reprieves and pardons”, under such rules and regulations as shall be prescribed by law, both before and after conviction. But can this be done before indictment, under the present law?—Const. Ala. art. 4, § 11; Code, § 3699; Pamphlet Acts, 1865–6, p. 106.

2. That a pardon *after* conviction does not release the costs, may be admitted, as that does not affect this case.

Here the pardon was *before* the conviction.—*The State v. Richardson*, 18 Ala. 109; *Holladay v. The People*, 1 Gillm. 214; *The State v. Farley*, 8 Blackf. 229; *Brown v. State*, 7 Eng. 626.

3. But, if the pardon comes before the conviction, as it does here, then it puts a stop to all further inquiry and prosecution. It makes the accused “a new man”—an innocent man; because this is the only sense in which he could be said to be made new. He is thereby “cleared” of all guilt, and of all its consequences.—7 Bouv. Bac. Abr. 415 (H); 9 Encyc. Amer. (*voc.* Pardon).

This is a general pardon, and the courts are bound to take notice of it, whether it be pleaded or not. In effect, it releases the defendant's guilt, and forbids his punishment for the offense pardoned. *Pro tanto*, it repeals the law of his crime.—7 Bouv. Bac. Abr. 413 (G); 7 *ib.* 405; *Rex v. Haines*, 1 Wil. 214; 7 Peters, 150; Hale's P. C. 278; *Roberts v. The State*, 2 Overt. 423; 26 Ala. 165; 1 Bin. 601; 4 Dall. 373.

4. If the defendant cannot be convicted, then there can be no taxation or judgment for costs against him; because it is on conviction alone that taxation and judgment for costs depend. In criminal cases, no costs were allowed at common law; costs are wholly the creature of the statute, and the statute requires that costs be taxed against the defendant only on conviction.—Code, §§ 3991, 4000; 2 Bouv. Bac. Abr. 484; 2 Sellon's Pr. 428; Archb. Cr. Pl. 151.

5. The State constitution gives the governor power to grant reprieves and pardons, under regulations prescribed by law. The act gives authority to “exercise the pardoning power before conviction, in all cases *in which* indictments *have been or may hereafter* be found.” And the governor's proclamation grants “amnesty and pardon” to all persons charged with certain offenses. The crime charged in this case comes within the limits of the proclamation. The word “amnesty” is not used in the constitution, nor the act of the legislature; but it gives a deeper force to the word pardon. The two together imply a total oblivion of the offense,—an entire freedom from punishment, and exempt the person on whom it is bestowed from all penal-

ty that the law inflicts for the crime charged. It wholly blots out the guilt of the accused, and after it is granted, it is slanderous to charge the person with the offense for which he has been pardoned. It seems absurd to contend that such an one could be convicted, fined, and taxed with costs.—Const. Ala. art. 4, § 11; Governor's Proclamation, Feb. 13, 1866; Acts 1855-6, p. 106; 2 Russ. on Cr. 974; Encyc. Amer. 216 (*voc. Amnesty*); 7 Pet. 160, 161; 7 Bouv. Bac. Abr. 415 (H).

6. One pardoned by general statute, as in this instance, cannot be allowed to waive his pardon, and plead guilty; because, after pardon, there is no law to punish him, and of this the court is bound to take notice. Costs are part of the punishment; they cannot be given by way of damages, as in civil cases. They therefore fall with the indictment, for it is on the success of this they stand; and the pardon dismisses the indictment.—Code, § 3991; Archb. Cr. Pl. 86, 87; 2 Russ. on Cr. 948; 2 Inst. 288; 2 Bouv. Bac. Abr. 484.

7. Pardon is a defense. It is a fact for a jury to find. It may be interposed by plea in bar, which properly concludes with a verification. But, if the plea has substance, it is sufficient. Here the plea was to the jury, and issue was taken on it as such. It was not a plea to the court. And being an answer to the whole indictment, it carried the costs with it.—Archb. Cr. Pl. 86, 87; Code, §§ 3649, 3650, 3651; 4 Chitt. Cr. Law, 376; Stark. Cr. Pl. 368.

8. The court, when it forms a judgment, constructs it out of certain materials, which are law. Here no judgment for costs at common law could have been given against the accused; and by our statute, no judgment can be rendered except on confession, for costs. In civil cases, this is otherwise; but in criminal cases, when the accused is convicted, the court may allow him to confess judgment for costs and fine, "with good securities"; or, if he fails to do this, or pay the fine and costs, may imprison him. The court's action here was wholly unauthorized.—Ram Judg. 3, *et seq.*; *McLeod v. The State*, 35 Ala. 395; Archb. Cr. Pl. 150; 2 Bouv. Ba. Abr. 484; Code, §§ 3624, 3625-31, 2375.

9. The lands within the area of the States and territo-

ries of the Union constitute the territory of the United States ; and within these limits, the constitution and laws of the Federal government are the supreme law of the land. All other constitutions and laws, within these boundaries, which conflict with the constitution and laws of the United States, are void. The Confederate State government of Alabama, from secession to the failure of the rebellion, was no government at all. It was but an attempt to form a government, which wholly failed. Such government, and all its acts, are void ; because it was, in purpose and in fact, in conflict with the supreme law of the land.—Const. U. S. art. 6, § 2 ; Ordinance of Convention September 12, 1865, pp. 48, 49 ; *Bronson v. Kinzie*, 1 How. S. C. 311 ; *Pollard's Lessee v. Hagan*, 3 How. S. C. 212.

10. After the formation of the Federal government, and the transfer of the colonial lands to this government, it became the proprietor of all the lands outside the boundaries of the States ; and no State or territorial government could be established on these lands, without the consent of congress. This consent could be given before or after the State was formed.—Act of Congress, admitting Alabama, Code, p. 25 ; Hickey's Const. of U. S. pp. 426, 423, 431 ; Const. of U. S. art. 4, § 3, chap. 2.

11. When new States are admitted into the Union, they form State governments, which are subordinate to the national government. The State government thus established is required to be republican. It must embody its act of formation in a written constitution. This constitution creates the State government ; and if it is in conformity with the constitution of the United States, it becomes henceforth the supreme law of the State. The government thus set up is a perpetuity ; it is not merely provisional. It cannot be legally overturned or altered, except by revolution, unless the alteration is effected in the manner prescribed by the constitution itself. And if the constitution directs how alterations shall be made, this becomes the law of such alterations, and must govern them. By our constitution, all this is provided for.—Const. U. S. art. 6, § 2 ; Const. Ala. *Preamble and Amendments* ; *Collier v. Frierson*,

24 Ala. 100 ; Const. Ala. art. 6, § 1 ; Story, Const. § 1807, *et seq.* ; Serg. Const. Law, 401, 398, *et seq.*

12. The constitution of this State makes a government ; it distributes its powers, and appoints the mode of its amendment. It vests the legislative powers in one set of officers, the executive in another, and the judicial in still a third. None of these powers are vested in a "convention of the people." There cannot be two law-making bodies in the State at the same time, whose powers are general. So the constitution of January 7th and March 4th, 1861, and the constitution of September 12th, 1865, and all their ordinances, are void, because these conventions were held without any legal warrant whatever. The powers they exercised were never vested in them, and could not be as long as the State constitution remained. They simply usurped their law-making powers ; and their constitutional amendments or revisions are void for want of submission to a vote of the people.—Const. Ala. (*Preamble*) ; *ib.* art. 2, §§ 1, 2 ; *ib.* art. 3, § 1, art. 4, § 1, art. 5, § 1 ; *Haley v. Clark*, 26 Ala. 439 ; *Stein v. Mayor &c. Mobile*, 24 Ala. 591 ; 24 Ala. 81 ; 22 Ala. 118 ; 26 Ala. 439.

13. To say that the people are supreme, that they can do as they please, regardless of the fundamental law by which they have bound themselves, is to say that constitutions do not bind the people. Conventions of the people are not things made of paper and printers' ink. They are such conventions as the people hold under the people's law. They are not conventions of a faction seeking to disregard the law. They are called by the people, for legal purposes, and not to utter the vociferations of the mob. A constitutional amendment may be illegal, as well as a law, and such cannot be made good. *Ubi ab initio non valet, in tractu temporis non convalescent.*—Const. Ala. (*Amends.*) ; Const. Ala., art. 1, § 30 ; Broom's Max. (772) 72 ; Const. U. S., art. 4, § 4, art. 1, § 2 ; 24 Ala. 591 ; 26 Ala. 100 ; 1 Kent, 448, 449, 450 ; Story Const., §§ 1807 *et seq.*

14. There was, then, no legal civil government in this State, from January 11, 1861, to July 20, 1865, if indeed ever since then ! The Confederate State government was a usurpation and a failure.—President Johnson's Procla-

mation, June 21, 1865; Gov. Patton's Proclamation, Feb. 13, 1866.

15. Then, if no lawful government, then also no lawful courts, during the reign of secession, for redress of wrongs in this State; and, as a matter of necessity, during this time the people were remitted to their natural rights of taking care of themselves as best they may; each one became the redressor of his own injuries, and in doing this, if he did not go beyond what was necessary for that purpose, he was justified. The defendant did no more than this in reference to his planks. He simply recaptured it from one who had no right to hold it. *Necessitas inducit privilegium*.—Decl. of Independence, Code, p. 9; *State v. Johnson*, 12 Ala. 840; Broom's Maxims, (6) 33; President Johnson's Proclamation, June 21, 1865; Gov. Patton's Proclamation, Feb. 13, 1866.

16. No doubt, the ultimate sovereignty, the government-making sovereignty, resides in the people. But, after a government is once formed by the people, they can only exercise this sovereignty by revolution, or in the manner they have prescribed to themselves in the constitution. The State in its corporate capacity is the people, limiting their conduct by the constitution. The State laws are their edicts.—Const. Ala. art. 1, § 30; *Dorman v. The State*, 34 Ala. 216; 3 How. S. C. 212, 224, 225.

. JNO. W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—It may be conceded that the governor had the authority to issue his proclamation of pardon, bearing date February 13, 1866, under the act approved December 14, 1865.—Pamphlet Acts, 1865–6, p. 106. But that act was repealed by the adoption of section 766 of the Penal Code, which went into operation the 1st day of June, 1866, which was prior to the trial of this cause in the court below. At the September term, 1866, of the circuit court, two pleas were filed by the appellant; one was, in substance, the proclamation of pardon issued by the governor, above referred to, and the other was the plea of not guilty. The cause had been continued at the spring term, 1866, by the State,

and appellant did not then plead his pardon or other plea. It appears that the offense with which appellant was charged, was committed in 1862; and the proclamation of the governor embraces all offenses, except rape and murder, committed between the 13th day of April, 1861, and the 20th July, 1865.

[1.] The counsel for the appellant contends, with much earnestness and ability, that the State of Alabama being in rebellion against the national government, at the commission of the offense, therefore all law was suspended in the State, and appellant was not responsible for the offense with which he is charged, and had the right to redress his own wrongs. We cannot assent to such a conclusion, or any part thereof. It is not supported by any respectable modern judicial authority, and is wholly at variance with the positions and authorities taken and cited in the opinion of this court, rendered at this term, in the case of *Watson and Wife v. Stone*.

[2.] It is also insisted that a pardon, granted before conviction, puts a stop to all further proceedings, and relieves the prisoner from the payment of costs. The weight of authority, English and American, seems to us to incline in favor of the proposition, that if such pardon is issued by the executive department of the government, it must be specially pleaded, to entitle the prisoner to his discharge from all the penalties of the law and the costs of the suit not then taxed against him; and that such plea is taken as evidence of the acceptance of the pardon, in the absence of any other evidence thereof.—*United States v. Wilson*, 7 Peters, 150; *Brikkenden's case*, Cro. Car. 9; *Baldoy v. Packard*, Cro. Car. 47; *The King v. Rodman*, Cro. Car. 198; 4 Hawk. 352, § 41; *The State v. Farley et al.*, 8 Blackf. 229; *Anglea v. Commonwealth*, 10 Gratt. 696. It seems also to be settled, that a prisoner must plead specially all pardons, except such as may be granted by the legislative department of the government.—*Foster's Cr. Law*, 43; *Swayne v. Rodgers*, Cro. Car. 32; *Bell's case*, Cro. Car. 449; 1 Baldwin, 91; 4 Hawk. 357, §§ 59–60; 359, § 64.

It has also been held, that where it is necessary to plead a pardon, it cannot be pleaded together with the plea of

not guilty, unless it be of a date subsequent to the time of the pleading such issues; if otherwise, it is waived by it.—4 Hawk. 360, § 67; Bacon's Abr. 414; 5 Com. Dig. 247; 1 Bish. Cr. Pro. § 596.

But, however this may be, under the liberal system of pleading allowed in this country, we proceed to dispose of this branch of the case on other grounds, in addition to the above. Upon the plea of "not guilty", issue was joined by the State's attorney. Upon this plea, the prisoner submitted his cause to the jury, without objection, and there is no evidence in the bill of exceptions which shows that the prisoner proved, or attempted to prove, the special plea. We do not intimate that this was necessary to be proved to the jury. The jury found a verdict against the prisoner, on the plea of "not guilty", and assessed a fine against him, and also found that the offense was committed within the time alleged in the special plea; and upon this verdict the court entered a judgment, in substance, for the costs of suit. If a prisoner, after pleading a pardon, pleads not guilty, and goes to trial upon it without objection, thereby insisting on his innocence, and the jury returns a verdict of guilty thereon, it is not error for the court to give judgment against him for costs.

[3.] We further hold, that the act of December, 1865, being repealed before the trial and the filing of the pleas, and before any acceptance by the prisoner of the pardon, so far as the record discloses, the appellant could not avail himself of the protection of the pardon, by an acceptance at that time; and this view is strengthened by the pleas, which, in effect, allege that he did not need or claim the pardon offered, but preferred to stand on his asserted innocence. In the case of *The United States v. Wilson*, (*supra*), Chief-Justice Marshal, in the opinion of the court, says: "A pardon is a deed, to the validity of which delivery is essential; and delivery is not complete without acceptance. It may, then, be rejected by the person to whom it is tendered, and if it be rejected, we have discovered no power in a court to force it on him." Upon the pleadings, evidence, verdict, and law, we hold, that the

judgment of the court below was as favorable to the appellant as he had a right to claim.

We now proceed to dispose of the exceptions taken to the several charges given by the court. The bill of exceptions does not purport to set out all the evidence introduced on the trial. It sets out what the evidence tended to show, but does not purport to set out *all* that it tended to show. In this state of the record, we can perceive no error in the charges given by the court, which operated any detriment to the prisoner. It devolves upon him to show error affirmatively. So far as the charges refer to the matter of the special plea and the pardon, it is very evident that whatever errors were committed, if any, were without injury to the appellant.

Let the judgment of the court below be affirmed.

OAKLEY vs. THE STATE.

[INDICTMENT FOR BUYING, RECEIVING, OR CONCEALING STOLEN PROPERTY.]

1. *Proof of ownership of stolen property ; admissibility of parol to explain written receipt.*—A written receipt, acknowledging payment of the purchase-money for the stolen property by the person who is alleged in the indictment to be the owner, is the first step in the proof necessary to show title or ownership as alleged, and is admissible for that purpose ; if the receipt shows that the money was paid by another person, as agent of the alleged owner, parol evidence is admissible to show that the contract was made by the agent, not for himself, but for his principal ; and the possession of the receipt by the principal is admissible evidence, as tending to show his ownership of the property.
2. *What constitutes larceny ; bailment, and rights of bailee.*—A contract by which the vendor of cotton stipulates with the purchaser that he 'will protect it from weather and stock as if it was still his own', and deliver it, when required, free of charge, at a specified railroad depot, constitutes the vendor the bailee of the purchaser, but gives him no power or authority to consent to the larceny or removal of the cotton

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by another person; and if the cotton is stolen or removed by a third person, the bailee's assent to the larceny or removal does not affect the character of the act.

FROM the Circuit Court of Bibb.

Tried before the Hon. JOHN MOORE.

THE indictment in this case was found on the 20th April, 1866, and charged that the defendant, William D. Oakley, "did buy, receive, conceal, or aid in the concealment of four bales of cotton, the personal property of Isaac Milnen, of the value of more than twenty dollars, knowing such personal property to have been stolen." No objection was raised to the indictment, and the trial was had, at the October term, 1866, on issue joined on the plea of not guilty. On the trial, as the bill of exceptions shows, "the State proved the execution and delivery of an instrument of writing," signed by Williamson Jones, and dated the 11th day of April, 1863, in the following words: "Received of John B. Hamilton, agent for Isaac Milnen, five hundred and thirty-six 75-100 dollars, in payment for four bales of cotton, weighing 2147 lbs., now stored at my own house; which I promise to protect from weather and stock, as if it was still my own cotton; and I further agree to deliver the same, free of charge, when required, at the Centreville depot on the A. and T. R. R. R. It is understood that I am not responsible for accident by fire, capture by the Federal forces, or destruction by order of the government C. S. A. to prevent Federal capture. Said cotton is to be marked *I. M.*, and weighs as follows," &c., specifying the weight of the bales. "The State offered to read said instrument in evidence, to which the defendant objected; but the court overruled his objection, and admitted said instrument in evidence; to which defendant excepted. The State introduced one Josiah Kennedy as a witness, who testified, that he was the agent of Isaac Milnen, and received said instrument above described from said Isaac Milnen in a letter; to which evidence the defendant objected, and, his objection being overruled, excepted. This was all the evidence as to the ownership of the cotton. Williamson Jones and Augustus B. Jones testified, that the cotton specified in said

instrument of writing is the same as that named in the indictment; that said cotton remained in an out-house on the premises of Williamson Jones, about four hundred yards from his dwelling-house in Bibb county, from the 11th April, 1863, until the 23d July, 1865, when it was stolen at night by said Augustus B. Jones, and carried to Ashley depot on the railroad, and delivered by him, on the 24th July, 1865, to the defendant. Said Augustus B. Jones testified, that he informed the defendant of the condition of the cotton; and both he and Williamson Jones testified, that said Williamson Jones knew nothing about the taking of the cotton, until after it had been taken and carried away as above stated."

"The court thereupon charged the jury, that before they could find the defendant guilty, they must be satisfied beyond a reasonable doubt—1st, that the offense, if any, was committed in Bibb county; 2d, that it was at or about the time stated by the witnesses; 3d, that the cotton was the property of Isaac Milnen at the time it was stolen, and, to determine this question, that they could look at the instrument above copied and all other evidence in the case; 4th, that the defendant, at the time he received the cotton, knew that it was stolen, or that, after he had received it, he learned that it was stolen, and then concealed, or aided in the concealment thereof.

"There were some circumstances which might tend to show that Williamson Jones knew that the cotton was going to be stolen by Augustus Jones; and the court thereupon charged the jury, that if they believed, from the evidence, that Williamson Jones had the bare and naked custody or charge of the cotton, without any special property therein, then he was not a bailee; but, if they believed, from the evidence, that he had any special interest in the cotton, then he would be a bailee; and that if he was a bailee, and the cotton was taken by his permission or consent, then the defendant would not be guilty.

"To the charges so given the defendant excepted, and then requested the court to instruct the jury, that Williamson Jones, under said instrument of writing, was a bailee; also, that the legal effect of said instrument was to vest the

title to the cotton in Hamilton. The court refused each of these charges, and instructed the jury, that while the title to said cotton, by said written receipt, might have been in Hamilton, they might look to said receipt and all other evidence in the case, to ascertain who was the owner of the cotton at the time it was stolen. To the refusal to charge as asked, and to the charge given, the defendant excepted."

JNO. T. HEFLIN, for the prisoner.

JNO. W. A. SANFORD, Attorney-General, *contra*.

A. J. WALKER, C. J.—The instrument of writing signed by Williamson Jones was the first step in the proof necessary to show a title as alleged in the indictment, and was, therefore, admissible in evidence. This instrument, containing the words, "Received of John B. Hamilton, agent of Isaac Milnen," was one which was susceptible of explanation by parol evidence, to solve the question whether it was a contract with Hamilton for himself, or as the agent of Isaac Milnen.—*Lazarus v. Shearer*, 2 Ala. 718; *Dawson v. Cotton*, 26 Ala. 591. The possession of the instrument by Isaac Milnen, as evidenced by its transmission in a letter from him to his agent, conduced to show that he was the real and true party in the contract, and that Hamilton was only his agent. The evidence of those facts, tending to show title as alleged, was properly received.

2. In the first charge given by the court there was no error. Williamson Jones was, by virtue of the contract of sale, the bailee of Milnen.—Story on Bailments, § 2. But the court committed no reversible error in failing so to charge. It was a charge that could not have aided the defendant, if it had been given. The consent of the bailee, to the larceny or asportation of the chattels bailed to him, can not take away from the transaction its character of larceny, unless it was given by the authority of the owner.—2 Bishop on Criminal Law, 827; *Hite v. State*, 9 Yerger, 198; *Rex v. Longstreeth*, 1 Moody, 137. By the bailment of his property, the owner was not divested of his right, nor was the bailee invested with the privilege of consenting to the larceny of the property. Trespass, as

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against the owner, may result from a wrongful taking with the consent of the bailee.—*Spivey v. State*, 26 Ala. 90; *Hall v. Goodson*, 32 Ala. 277.

The charge which asserts that the chattel was not stolen if the asportation was with the consent of the owner's bailee, was incorrect, but too favorable to the defendant, and can not justify a reversal at his instance. In the giving and refusal of the other charges we find no error.

The judgment is affirmed.

CHRISTIAN vs. THE STATE.

[INDICTMENT FOR RETAILING SPIRITUOUS LIQUORS.]

1. *Selling liquor drunk on or about premises of seller.*—It being shown in this case that the defendant sold two bottles of whiskey, which the purchaser "carried out into a public road, five or ten steps in front of the defendant's store, and that the liquor was drunk by a crowd of persons, between the store and the road, and in the road;" and the court having thereupon charged the jury, "that it was the defendant's duty, if he sold the whiskey, to prevent it from being drunk on or about his premises, and that if the liquor was drunk, as stated, in front of the defendant's store, and between the store and the road, and in the road, they should find the defendant guilty,"—*held*, that the charge was correct, although it was also proved that, at the time of the sale, the defendant "told the purchaser that he must carry the whiskey out of his house, and away from his premises," and that the purchaser promised to do so.

FROM the Circuit Court of Bibb.

Tried before the Hon. JOHN MOORE.

THE indictment in this case was found at the April term, 1866, and charged that the defendant, before the finding thereof, "sold vinous or spirituous liquors without a license, and contrary to law." "On the trial," at the October term, 1866, as the bill of exceptions states, "a witness was introduced for the State, who testified that, at

a place called Benson in said county, he purchased from the defendant two bottles of whiskey, which he carried out of the defendant's store, into a public road, five or ten steps from the defendant's store ; and that the whiskey was drunk by a crowd of persons, between the store and the road, and in the road. When the whiskey was bought by said witness, the defendant was a merchant, carrying on the business of merchandizing, at Benson in said county, in a rented store by the road, where the liquor was drunk ; and the witness did not know whether the liquor was consumed on the defendant's land or not. At the time the defendant sold the whiskey, he told the witness that he must carry it out of his store, and away from his premises ; which the witness promised to do when he bought the whiskey. This was all the evidence in the case. The court charged the jury, that it was the defendant's duty, if he sold the whiskey, to prevent it from being drunk on or about his premises ; and that if they believed from the evidence, beyond a reasonable doubt, that the defendant, in said county, and in March last, sold the whiskey as stated, and that it was drunk as stated, in front of his store, and between the house and the road, and in the road, then they should find the defendant guilty. To this charge the defendant excepted."

HEFLIN & McCRAW, for the defendant, argued that the charge of the court imposed upon the seller of spirituous liquors a heavier duty and responsibility than could be justified by reason or authority ; that it made him criminally responsible for the acts of third persons, over whom he had no control, and required him to resort to physical force, even to the taking of life, to prevent the purchaser, or any third person, from drinking the liquor about his premises, even though such person might be on his own land, or in the public road.

JNO. W. SANFORD, Attorney-General, *contra*, cited the following cases : *Easterling v. The State*, 30 Ala. 46 ; *Brown v. The State*, 31 Ala. 353 ; *Patterson v. The State*, 36 Ala. Rep. 297.

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BYRD, J.—After giving a careful consideration to the able argment of the counsel for the appellant, we feel constrained to affirm the judgment of the court below, on the authority of the cases cited on the brief of the attorney-general. The charge of the court is correct.

In referring to the case of *Patterson v. The State*, as authority, we do not commit ourselves to the position that, if the liquor is drunk in *another State*, although on or about the premises of the seller, he is guilty, as matter of law or fact, of the offense of retailing under section 1058 of the Code.

Judgment affirmed.

EX PARTE WREFORD.

[APPLICATION TO HEAR PETITION FOR BAIL.]

1. *Practice on petition for bail; when heard.*—The practice has grown up in this court for several years past, of hearing applications for bail, and other similar cases, on the request of counsel, at any time before the minutes are signed, although after the expiration of the time allotted to the regular business of the term; but, hereafter, such cases will only be heard during the regular term, unless the *public interest* should require a hearing of some particular case after that time.

APPLICATION for bail by Samuel P. Wreford, after its refusal by Hon. THOMAS M. ARRINGTON, presiding in the city court of Montgomery. The prisoner was indicted, by a special grand jury, on the 6th March, 1867, for willfully setting fire to a store-house in the city of Montgomery; and was tried during the March term of said city court, under said indictment. The jury being unable to agree on a verdict, after about ten days' deliberation, were discharged by the court, and a mistrial entered, against the defendant's objections; the minute-entry reciting that all the other business of the court was disposed of. The petitioner thereupon applied to the court to be admitted to

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bail, but his application was overruled and refused. All the evidence adduced on the hearing before the city judge was reduced to writing, and embodied in the bill of exceptions; and the petitioner thereupon renewed his application to this court. The petition was filed in this court on the 8th April, 1867; Hon. A. J. WALKER, C. J., and Hon. THOS. J. JUDGE, J., being present. All the regular business of the term had been disposed of, and the time allotted to the several divisions had expired, before the petition was filed; but the minutes of the term had not been signed. The following opinion was delivered on the preliminary question, whether, under these circumstances, the court would hear the application at this time.

GOLDTHWAITE, RICE & SEMPLE, and STONE, CLOPTON & CLANTON, for the petitioner.

JNO. W. A. SANFORD, Attorney-General, and WATTS & TROY, *contra*.

A. J. WALKER, C. J.—Section 570 of the Code provides as follows: “The regular sessions of the supreme court commence on the first Monday in January and June, in each year, and must continue from day to day, Sundays excepted, until the business thereof is completed; but a special session may be holden by the direction of the court, when the public interest requires.” From this section it is clearly deducible that the legislature contemplated the termination of a term with the completion of the business thereof. For the last eleven years, and perhaps longer, the court has not formally adjourned until the Saturday next before the Monday on which a new term commences. This usage commends itself for the prolonged opportunity which it affords for the correction of errors, and the reconsideration of judgments and opinions. It was in this view that it was adopted, and has been maintained. Upon the expiration of the time allotted for the hearing of causes, the term, for all other purposes than the correction of errors, ends. From that time, the continuation of the term has but the one purpose—the correction of errors into which the court or its officers may have fallen. The spirit and

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intent of the section quoted is preserved, by a convention of the court and the hearing of cases, "when the public interest" requires it. When "the public interest requires," the statute contemplates that a "special session" should be holden. It is in that contingency, and that alone, that the court ought to assemble for the hearing of a case, after the period for the trial of causes has expired. The special convention of the court for the hearing of causes ought to correspond with the special sessions mentioned in the statute. The assembling of the court, on the petition of counsel, full of ardor and zeal in their cases, whenever they may consider that the condition of their clients presents cases of peculiar hardship, would be not only personally onerous to the court, but detrimental to the public welfare, by interfering with the preparation of opinions, and the study of cases by the judges. It would operate as a special and partial favor to the bar at the capital, whose location gives them peculiar opportunities for presenting cases outside of the regular order, which the zeal of counsel in their particular cases may lead them, without any design of injustice to others, to use to such an extent as to consume time which is due to the consideration of causes already heard from all parts of the State. We think, for the reasons above stated, that the correct practice is to hear cases, after the regular business of the court is completed, only when we can perceive that the public interest requires it. This rule the court resolved during its late sitting to adopt, but made no public announcement of its resolution.

During the last few years, a practice grew up of hearing causes without much discrimination, upon the request of counsel, a quorum of the court being resident at the seat of government. This practice, although always deprecated, was the result of the gradual encroachments, which solicitation, the complaisance of the judges, the apparent hardship of particular cases, and other causes incident to the times, made upon a sound general rule. The previous practice and resolution of the court being such as is above stated, we have an application to hear this case, pressed with much earnestness by very respectable counsel. In refusing to hear the case, we should depart from the prac-

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tice of the same court, as it has been for years, upon a resolution not heretofore publicly announced. After deliberation upon the subject, we think it better to yield to the wishes of the counsel on both sides, without scanning very closely the question, whether the public interest requires that the case be heard, rather than to establish a practice somewhat variant from that which has prevailed for some time, without public announcement of our intention. It is better that this court should not *even seem* to bend its rules to cases.

The court decides to hear the case presented, accompanying its assent to do so with an announcement of the reason, and a public declaration of the rule which will govern it in future in reference to such applications. That rule is, that every such application, not being for the correction of the errors of the court or its clerk, will be heard after the regular business of the term is completed, *only* when the court can see that the public interest requires it.

JEFFRIES AND JEFFRIES (FREEDMEN) vs. THE STATE.

[INDICTMENT FOR LARCENY OF MULES.]

1. *Second trial after reversal of former conviction.*—The law is well settled in this State, that where a judgment of conviction in a criminal case is reversed on error or appeal, at the instance of the prisoner, he thereby waives his constitutional immunity against being placed a second time in jeopardy, and may be tried again; and the fact that he has already suffered a portion of the prescribed term of imprisonment under the former judgment, in consequence of the failure of the court to order a suspension of the sentence pending the proceedings in the appellate court, while it may give him a strong claim to executive clemency, is no bar to another trial.

FROM the Circuit Court of Greene.

Tried before the Hon. JAMES COBBS.

THE defendants in this case, who were freedmen, were indicted at the October term of said circuit court, 1865, for the larceny of two mules; were tried and convicted at the same term, and sentenced to ten years' imprisonment in the penitentiary. At the January term of this court, 1866, the judgment of said circuit court was reversed, at the instance of the prisoners, and the cause remanded; and it was further ordered, "that the defendants be retained in custody by the sheriff, until discharged by due course of law."—See the case reported in 39th Ala. 655-63. At the April term, 1866, of said circuit court, as the record in the present case shows, a judgment was rendered in the cause, which, after reciting the reversal of the former judgment, and the fact that the defendants were then confined in the penitentiary, "ordered that the sheriff of said county furnish the warden of the penitentiary a certified copy of said order remanding the cause for trial, and that said defendants be brought by said sheriff and committed to the jail of said county for a new trial at the next term of this court."

On the trial, at the October term, 1866, as the bill of exceptions shows, the defendants being again arraigned, "pleaded *autrefois convict*, in short by consent," and a special plea, which, after setting out the indictment and the former trial and conviction, averred that, on the former trial, "said presiding judge made no order suspending the execution of said sentence, the bill of exceptions having been signed subsequently to the time when sentence was pronounced; that soon after the adjournment of said court, to-wit, within five days thereafter, the said defendants, in pursuance of said sentence and judgment, and by authority thereof, and pending their said appeal, were taken by the sheriff of said county, and carried to the penitentiary, and delivered to the officer in charge thereof, and there remained, suffering and undergoing such judgment and punishment as aforesaid, until the 14th of February, 1866; that said supreme court, on the hearing of defendants' said appeal, reversed said sentence and judgment of said circuit court, and remanded said cause for further proceedings, as by the judgment of said supreme court, rendered in said cause on the 14th February, 1866, [appears]; that after said re-

versal, said defendants, under an order from the judge of the seventh judicial circuit of Alabama, were brought back from said penitentiary, to abide such other and further proceedings as might be had against and concerning them in said cause; that said defendants, who are now arraigned and charged under said indictment, are the same defendants, and none other, who were tried, convicted, sentenced, and sent to the penitentiary at said fall term, 1865; that the indictment under which they are now arraigned and charged, is the identical indictment under which they were tried and convicted at said fall term, 1865; that the offense with which they are now charged, is the same offense, and supported by the same evidence, as the offense for which they were tried, convicted, sentenced, and sent to the penitentiary, as aforesaid; and this they are ready to verify."

The court overruled a demurrer to this special plea, and required the prosecuting attorney to join issue on it. "The cause having been submitted to the jury on the facts stated in said special plea, which were proved, the entire record of the proceedings on the former trial, and matters of record subsequent to that trial, together with the opinion and amended opinion of the supreme court, were offered in evidence; and such matters of record as were proper to be inserted in said plea, by consent, were considered as set forth therein fully; and there was no other evidence, except of the facts in said plea. The court charged the jury, that if they believed, from the evidence, that the defendants had obtained a reversal of the judgment, they might be tried again, and the jury must find the issue against them;" to which charge the defendants excepted, and which presents the only point for revision in this court.

E. MORGAN, and GEO. GOLDTHWAITE, Jr., for the prisoners. The circuit court unquestionably had jurisdiction, both of the offense and of the parties. The indictment was good, and the prisoners might have been legally convicted under it, as is shown by the former decision in the case. A judgment of conviction in such case, though erroneous, and liable to be reversed, is voidable only, and valid until reversed.

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1 Bishop's Criminal Law, §§ 620, 646, 663, and cases cited; 2 Leading Criminal Cases, 554, and cases cited; *Ex parte Watkins*, 3 Peters, 207. If sentence has been performed under such erroneous judgment, a second conviction for the same offense cannot be sustained.—2 Leading Criminal Cases, 554; 1 Bishop's Criminal Law, § 664; *Commonwealth v. Lord*, 3 Metc. (Mass.) 328. When a reversal cannot place the prisoner in the same position he occupied when the error was committed, he must be discharged.—*Ned v. The State*, 7 Porter, 216.

JNO. W. A. SANFORD, Attorney-General, *contra*.—It is admitted that, for the same offense, no person can be twice put in jeopardy, and that the accused is put in jeopardy when a jury is organized and sworn to try the case.—1 Bishop's Criminal Law, § 659, and authorities cited. But, when a new trial is granted, or the judgment is reversed, at the instance of the accused, he may be tried again for the same offense.—*The State v. Abram*, 4 Ala. 272; *Cobia v. The State*, 16 Ala. 781; *Phil v. The State*, 1 Stewart, 31; 2 Leading Criminal Cases, 554; *Turner v. The State*, at the last term. The seeming qualification of this rule laid down in *Ned's case*, (7 Porter, 187,) refers merely to the *status* of the accused before the court, and not to the punishment he may have already suffered, or other hardship of the particular case.

A. J. WALKER, C. J.—We regard it as well established law in this State, that a prisoner may waive his constitutional immunity against being a second time placed in jeopardy, and that he does make such waiver, when, by a proceeding instituted by himself, he procures a reversal of his conviction.—*Hughes v. The State*, 35 Ala. 347; *Cobia v. The State*, 16 Ala. 781; *State v. Hughes*, 2 Ala. 102; *State v. Abram*, 4 Ala. 272; *Ned v. The State*, 7 Porter, 187; *State v. Phil*, 1 Stewart, 31. The fact that the prisoner had suffered a portion of the prescribed imprisonment, before the reversal of his case, can not change the principle. The failure of the court to delay the punishment, pending the proceedings in the supreme court, may give the prisoner a

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strong claim on the executive clemency, for a reduction of the period of imprisonment; but it does not present any legal bar to another trial, after he has procured a reversal.
Affirmed.

SMITH vs. SHORT.

[ACTION ON ACCOUNT FOR BOARD AND LODGING.]

1. *Constitutionality of act of congress requiring stamp on process of State courts.*—Congress has not the constitutional power to impose a tax on the process or proceedings of the State courts; consequently, the act of congress approved June 30, 1864, providing for the internal revenue of the government, so far as it requires a stamp to be affixed on legal process issuing from the State courts, is unconstitutional and void. (BYRD, J., holding that said act did not apply to process issued from the State courts.)

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Thomas Short, against Joseph Smith, to recover the sum of three hundred dollars, alleged to be due for "board and lodging furnished by plaintiff to Hartsfield, wife, and servant, at the request of the defendant"; and was commenced on the 24th November, 1864. At the November term, 1865, judgment by default was rendered, for want of a plea, and a writ of inquiry was awarded; and the writ of inquiry was executed at the January term, 1866. The judgment of the court is now assigned as error, on account of the failure to affix to the process an internal-revenue stamp as required by act of congress of the United States.

W. BOYLES, for appellant.

DARGAN & TAYLOR, *contra*.

JUDGE, J.—The question to be decided in this case is, whether congress has the power to tax legal proceedings in the State courts. The first clause of the 8th section of the 1st article of the constitution confers on congress the power of taxation, in the following words: “The congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States.” The power thus conferred, though not unlimited, but restricted in terms to specific objects—viz., the payment of the public debts, and providing for the common defense and general welfare—is, nevertheless, “co-extensive with the powers, wants, and duties of the national government.” For the construction of the powers of congress in regard to taxation, see *Hylton v. The United States*, 3 Dallas, 171; *Loughborough v. Blake*, 5 Wheaton, 317; 2 Story on the Constitution, § § 904, 905, 930; 1 Kent’s Com. 254, 267.

Conceding the power of congress over the subject to be as plenary as has ever been claimed for it, yet instruments of the State administration have never been subjected to specific taxation, by way of stamp or license duties, until the passage of the internal-revenue act of June 30, 1864; although, in 1797, congress passed a stamp act, very general in its character, as to the subjects of taxation.—1 Story’s Laws U. S. 466. The question was then presented, as to the power of congress even to require a license from attorneys to practice in the State courts, it being conceded that it might to practice in the United States courts; and the law then enacted respected, in this regard, the rights of the States.—*Warren v. Paul*, 4 Am. Law Reg., N. S., 157; 2 Benton’s Debates, 155.

The act of June 30th, 1864, imposes a tax on the right to justice in the State courts, by requiring stamps upon legal documents, as follows: “Writ, or other original process by which suit is commenced in any court of record, either of law or equity, fifty cents. Where the amount claimed in a writ, issued by a court not of record, is one hundred dollars or over, fifty cents. Upon every confes-

sion of judgment, or *cognovit*, for one hundred dollars or over, (except in those cases where the tax for the writ of a commencement of suit has been paid,) fifty cents. Writs, or other process on appeal from justices' courts, or other courts of inferior jurisdiction to a court of record, fifty cents. Warrant of distress, when the amount of rent claimed does not exceed one hundred dollars, twenty-five cents. When the amount claimed exceeds one hundred dollars, fifty cents. *Provided*, That no writ, summons, or other process, issued by, and returnable to, a justice of the peace, except as hereinbefore provided, or by any police or municipal court having no larger jurisdiction as to the amount of damages it may render than a justice of the peace in the same State, or issued in any criminal or other suits commenced by the United States or any State, shall be subject to the payment of stamp duties: *And provided further*, That the stamp imposed by the foregoing schedule B on manifests, bills of lading, and passage tickets, shall not apply to steamboats or other vessels plying between the ports of the United States and ports in British North America. Affidavits in suits or legal proceedings shall be exempt from stamp duty."—2 Brightley's Digest, 272.

It has been the generally received opinion, that the government of the United States is one of special and enumerated powers; that while in the exercise of these powers, for national purposes, it is vested with supremacy, yet the State governments, being in the full possession of all their unsundered powers of sovereignty, are, within their sphere of action, likewise supreme; and that the States are to have independent civil and judicial systems of their own, which, if not incompatible with the constitution of the United States, nor with the laws made in pursuance thereof, are not to be encroached upon or controlled by congress, but are to have free and unmolested existence.

The several States having the inherent power to establish and continue in existence judicial tribunals of their own, and the exclusive right to regulate, within the pale of the constitution, the proceedings in such tribunals, no legislation by congress, in derogation of these rights, can be constitutional. That the imposition of the tax on judi-

cial process of the State courts is an unconstitutional innovation of the State prerogatives named, we do not doubt; for, if the power to impose such a tax exists, it is of its nature unlimited, and may be so exercised as to result, in effect, in the complete subversion of the State tribunals, and consequent annulment of that provision of our State constitution which had its origin in *Magna Charta*, and which declares, that "All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay."—Bill of rights, § 14.

A question, analogous in principle to the one we are considering, was passed upon by the national tribunal of last resort, in the case of *McCulloch v. The State of Maryland*, 4 Wheaton, 316. In that case, it was held, Chief-Justice Marshall delivering the opinion of the court, that the stock of the United States Bank was exempt from taxation by the States, because of the bank being a constitutional means employed by the government of the Union to execute its constitutional powers. The arguments put forth to sustain this proposition are unanswerable, and apply with equal force to the question involved in the case before us.

In the case cited above, Chief-Justice Marshall announced the following propositions as not to be denied, viz.: "That the power to tax involved the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control." And the same distinguished judge said further: "If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax *judicial process*; they may tax all the means employed by the government, to an excess which would defeat all the ends of government."

May we not say, with equal propriety, if congress may tax one instrument employed by the State governments in the execution of their undoubted powers, it may tax any and every other instrument; it may tax new or amended State constitutions; it may tax, in legislative proceedings, bills, journals, and laws; it may tax State commissions; it may tax minute-entries, judgments, and decrees of the courts; it may tax ballots in elections; it may tax all the means employed by the State governments, to an excess which would defeat all the ends for which State governments exist.

The power of taxation remains in the States, concurrent and co-extensive with that of congress; with the sole exception of duties on imports and exports, which the States can not impose except by the consent of congress.—2 Story on Con. § 937. Therefore, congress has no more the power to tax judicial process of the State courts, than have the States to tax judicial process of the national courts.

Our conclusion as to the constitutionality of the tax in question, is sustained by able authority, direct to the point. In a late number of the American Law Register, (vol. 4th, p. 165,) Judge Redfield, late chief-justice of the supreme court of Vermont, and eminent as a profound jurist, says: "It has seemed to us most unquestionable, from the very first, that congress could not impose a specific tax of any kind upon any of the indispensable governmental functions of the States, whether by way of license to the attorneys and counsellors practicing in State courts, or stamp duties upon their processes." Judicial determinations, too, of the identical question involved, in harmony with our own conclusion, have recently been made by the supreme courts of several of the States; but to the official reports of the cases we have not had access. And should the question ever come before the supreme court of the Union, we believe these State adjudications will be sustained by that shield of the constitution.

It should be an object of the first importance to preserve, free and untrammelled, the jurisprudence of the several States. As Chancellor Kent has said: "The judicial power of the United States is necessarily limited to national ob-

jects. The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and domestic relations, fall within the control, and we might almost say the exclusive cognizance, of the State governments. We look essentially to the State courts for protection to all these momentous interests. They touch, in their operation, every cord of human sympathy, and control our best destinies. * * * * * The *true interests*, and the *permanent freedom* of this country, require that the jurisprudence of the individual States should be cultivated, cherished, and exalted, and the dignity and reputation of the State authorities sustained with becoming pride."—1 Kent's Com. 445-446.

Let the judgment of the circuit court be affirmed.

BYRD, J.—I concur in the result of the opinion of the court, but by a very different line of argument from the one taken therein. I do not assent to all the reasoning of the opinion, but deem it unnecessary to point out and discuss such portions as I do not approve. I am content to say that, admitting, for the sake of the argument, that the stamp act, if applicable to process of the State courts, would be unconstitutional, yet there is a rule of law which requires that courts should *never* impute to the legislative department of the government an intention to violate the constitution, nor *even* a violation of it, when any reasonable construction can be given to its enactments without producing such a result.

The language of the act, I admit, is very general; but, in my opinion, it can be legitimately interpreted as *only* applicable to process issued by the courts of the United States, held in the States, the territories, and the District of Columbia, as also to such issued by the justices and police courts of the latter. In a form of government like ours, where there are two—the State and national—legislative bodies clothed with sovereign powers, the enactments of neither should ever be held to affect the other, or any department of the other, unless the act expressly does so. It should never be done by implication, and especially if, in doing so,

it would only involve the enacting power in a charge of having violated the fundamental law of the land. The courts should be astute to avoid such a result, particularly where no injury is done to any one, or to either government. To illustrate: should congress, or the legislature of the State, enact a law, which in words "prohibits *all* courts from performing judicial acts on holy days", or provides "that *no* court shall do so", or enjoins "*every* court to do a certain thing,—in all such cases, the terms "*all courts*", "*no court*", "*every court*", would only refer to the courts of the sovereignty by whose legislative department the law was enacted; and so, if the terms "*no officer*", "*every officer*", &c., were used. In the stamp act, neither the terms "*State courts*", nor any equivalent ones, are used; and I therefore hold, that the act does not apply to process issued by these courts; and there is then no impropriety in my giving, or even intimating, an opinion on a question which does not exist, or arise in this case; that is, would the act be constitutional if it embraced process issued by the State courts? and I shall not volunteer one. If it were construed to embrace State process, and therefore held unconstitutional, and if, on the other hand, it could be construed not to include such process, I should certainly resort to every rule of construction to avoid the former and adopt the latter. I think the latter is plain and clear enough to relieve me from a consideration of the former.

MODAWELL vs. HOLMES.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Parties to appeal, and security for costs.*—From a final decree of the probate court against A. H. a *non compos mentis*, to be levied of the goods and chattels &c. of the said A. H. in the hands of his guardian, W. B. M., an appeal may be prosecuted "by W. B. M. as guardian of A. H."; and if the clerk's certificate states "that the said W. B. M.

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- gave A. B. as security for the costs of said appeal," this is a substantial compliance with the requisitions of the statute.
2. *Non compos mentis* guardian ; settlement of accounts of.—If a guardian becomes *non compos mentis* without having settled his accounts, the probate court may compel or allow a settlement of his accounts by his guardian ; the proceedings being conducted in the name of the *non compos* guardian by his guardian, and the decree for any balance found against him being rendered against him individually, to be levied of his goods and chattels in the hands of his guardian.
 3. *Conclusiveness of final decree*.—A decree of the probate court, rendered on final settlement of an administrator's accounts and vouchers, is conclusive until reversed ; and if the administrator is also the guardian of the sole minor distributee of the estate, he cannot be charged, in a subsequent settlement of his accounts as guardian, with the value of assets which were not accounted for on his settlement as administrator, although the other distributee appears in open court, and releases all his interest to the said minor.
 4. *Judicial notice of public currency*.—The appellate court cannot take judicial notice of the extent of the depreciation of the currency during the late war.
 5. *Allowance of counsel fees to guardian*.—To entitle a guardian, on final settlement of his accounts, to an allowance for counsel fees, he must show that he has already paid them.

APPEAL from the Probate Court of Dallas.

IN the matter of the final settlement of the accounts and vouchers of Anderson Holmes, as guardian of William Holmes, a minor, by William B. Modawell, guardian of the person and property of said Anderson Holmes, who had been declared *non compos mentis*. William Holmes, the infant, was the only child of William P. C. Holmes, deceased ; and he and his mother, Mrs. Mary C. Holmes, the widow of said decedent, were the only distributees of said estate. Anderson Holmes was appointed guardian of said William Holmes, by said probate court, on the 18th December, 1854. The record does not show when said Anderson Holmes was declared *non compos mentis*, nor does it set out any of the proceedings had before said probate court in that matter. The account-current for the settlement of the guardianship of said minor was filed by said Modawell, as guardian of said Anderson Holmes, on the 9th April, 1866 ; and the minute-entry states that, "objections being made by B. H. Craig, the guardian *ad litem* of said William Holmes," the

hearing of the application was continued until the 15th day of May, 1866; but the objections to the account are nowhere stated in the record. The decree of the court on the settlement, and the bill of exceptions reserved on the part of the guardian, are as follows:

^AProbate Court, May 17, 1866. This being the day set apart by previous order of continuance for the final settlement of the accounts of Anderson Holmes, as guardian of William Holmes, a minor child of W. C. P. Holmes, deceased, came William B. Modawell, who is the guardian of the person and estate of said Anderson Holmes, who has been declared to be *non compos mentis*; and William Holmes, the ward, was represented by B. H. Craig, his guardian *ad litem*, and by his attorney. And the said William B. Modawell, as the guardian of said Anderson Holmes, having heretofore, on the 9th day of April, 1866, filed his account-current of the guardianship of Anderson Holmes on the estate of his ward, William Holmes, and exceptions being filed thereto by the guardian *ad litem* of said William Holmes, the same were submitted to the court, on the evidence adduced by both parties; and, as a part of the evidence in the cause, Mrs. Mary C. Holmes, the mother of said William Holmes, and the only other person interested in the estate of W. C. P. Holmes, deceased, her late husband, and the father of said William Holmes, appeared in open court, and relinquished to said William Holmes all her interest, of all and every kind and character, in and to any and all property or moneys, rights and credits, left in the hands of said Anderson Holmes, as the administrator of the estate of the said W. C. P. Holmes, deceased, or in any other capacity. And upon consideration of the evidence, the court stated an account against said Anderson Holmes, of his guardianship for said William Holmes, which is ordered to be recorded; whereby it appears that, after the allowance of all just credits to the said Anderson Holmes, he is this day indebted to said William Holmes in the sum of eight thousand and eighty-one 13-100 dollars; and it appearing that Mary C. Holmes has been duly appointed and qualified as the guardian of said William Holmes, it is ordered, adjudged, and decreed by the court, that said Mary

C. Holmes, as guardian, have and recover of the said Anderson Holmes the said sum of eight thousand and eighty-one 13-100 dollars ; for which execution may issue against the good and chattels, lands and tenements of the said Anderson Holmes, in the hands of his guardian, William B. Modawell."

"Be it remembered that, on the trial of this cause, the following proceedings were had : It appearing in evidence that William Holmes, the infant, was the owner of the following slaves, to-wit, Amos, Satira, Henry, Doctor, Moses, Jane, Lena, and Martha ; four of whom, to-wit, Amos, Moses, Satira, and Jane, were grown, and for whose annual hire the guardian charged himself in the account ; the contestant introduced the following testimony in support of his exceptions : It was proved that Anderson Holmes became the guardian of said William Holmes on the 18th December, 1854 ; and that the said slaves were kept together and worked, with other negroes, on the plantation of said Anderson Holmes, on which he resided, from the 18th December, 1854, until the close of the late war, in April, 1865. The contestant read in evidence, also, the record of the proceedings had in the probate court of said county, showing that no order had ever been made allowing the guardian to keep said slaves in his possession ; but the guardian made annual settlements in 1855, 1857, and 1859. *J. Lee*, a witness for the contestant, testified, that negro men, good field-hands, hired in 1858 and 1859, at from one hundred and fifty to two hundred dollars *per annum*, and women at from one hundred to one hundred and twenty-five dollars ; that he hired a negro woman who was a fair field-hand, in 1864, for seventy-five dollars, payable in Confederate money ; that he resided in the neighborhood of said Anderson Holmes, and considered the foregoing fair prices in that neighborhood ; and that the hire of negroes by the year, during the war, amounted to about the same price in Confederate money, in his judgment, as they were worth in good money before the war. *Mrs. Mary C. Holmes* testified, on the part of the contestant, that said Amos and Moses were worth about two hundred dollars *per annum* before the war, and Satira and Jane about one

hundred and twenty-five each ; that she did not know what they were worth during the war, but they were not worth as much as before the war. *H. D. Corley* testified, on the part of the contestant, that Amos and Moses were each worth, in 1857, from one hundred and fifty to two hundred dollars ; that first-class women, field-hands, were worth that year from one hundred and thirty to one hundred and fifty dollars ; and that he did not know what such negroes were worth during the war, but they were not worth so much. Said Modawell asked said Corley this question, 'Considering the ages and condition of all the negroes, the amount necessary to expend in clothing and feeding them, paying their doctor's bills and taxes, and taking care of the children, were they all worth more than two hundred dollars *per annum* ?' The contestant objected to this question, on the ground that it called for the conclusion of the witness ; which objection the court sustained, and refused to permit the witness to answer the question ; to which the said Modawell excepted. Before this question was put to said witness, several other witnesses had testified, at the instance of said Modawell, as to the value of keeping and raising the young negroes, and the time when they would be old enough to earn their own living ; and the court stated, that the witness might testify as to the hire of each negro, and the amount that ought to be allowed for raising the young negroes. *J. T. Cain*, a witness for said Modawell, testified, that he hired a negro woman for the year 1863, for forty dollars ; that he hired two women and a man, in 1864, for three hundred dollars, and a man, a woman, and girl, in 1865, for four hundred dollars ; that these prices were payable in Confederate money ; that said negroes were fair field-hands, and were hired in the neighborhood of said Anderson Holmes ; that the above prices were fair and reasonable for such negroes, and were such as were usually given during those years ; that he resided in the neighborhood of said Anderson Holmes ; and that negroes were worth, during the war, about what was necessary to feed, clothe, and support them, and pay their doctor's bills and taxes. *Jacob Givhan*, another witness for said Modawell, testified that, in 1863, he hired two women and a

plow-boy, for two hundred and fifty dollars; that in 1864, he hired two women for one hundred and sixty dollars; that these negroes were fair field-hands, and the prices paid for them were reasonable, and such as were usually paid in that neighborhood, and that he resided in the neighborhood of said Anderson Holmes. The above being, in substance, all the material evidence relating to the value of the hire of the negroes, the court thereupon charged the guardian with the sum of three hundred and thirty-seven 50-100 dollars, for the hire, during each of the years 1862, 1863, and 1864, and with one hundred and five 50-100 dollars, for the year 1865; to each of which said charges said Modawell excepted."

"In order to charge the guardian with the value of a slave named Charles, the contestant proved, that said Anderson Holmes was appointed administrator of the estate of W. C. P. Holmes, deceased, by said probate court of Dallas, on the 20th June, 1853; and then introduced in evidence the inventory and appraisement of said estate, whice was returned into court by said administrator, under oath, and dated the 9th of August, 1853. On the list of slaves in said inventory and appraisement, was a negro by the name of Charles, valued at eight hundred dollars; and the following certificate was appended by the appraisers: 'Charles is appraised, although the question of ownership is not decided by the administrator or appraisers. This boy has been, for several years, in the possession of said W. C. P. Holmes, although, at the time he obtained the possession, it was agreed that he was to pay A. Holmes for him, which he has never done. The question of ownership is submitted to the judge of the probate court.' The contestant then introduced a witness who testified, that Charles was in the possession of said W. C. P. Holmes for more than three years next preceding his death, and was kept at work on the plantation of said Anderson Holmes, from the death of said W. C. P. Holmes, to the 28th April, 1865; that said W. C. P. Holmes took said negro home at the same time he took the others mentioned in the appraisement, and kept him, and worked him, and claimed him as he did the others; that said negro was in his possession

when he died, and was taken by Anderson Holmes, two days afterwards, to his own place, with the other negroes belonging to said estate. Said Modawell then introduced evidence showing that said slave, before he went into the possession of said W. C. P. Holmes, belonged to said Anderson Holmes; that said Anderson, as the administrator of said W. C. P. Holmes, applied to said probate court, and obtained an order to distribute the slaves of said deceased between his widow, Mrs. Mary C. Holmes, and said William Holmes, the sole distributee of said estate; that commissioners were appointed by said court, on the 8th November, 1853, to make said division; that said commissioners made their report to the January term of said court, 1854, which was received, confirmed, and ordered to be recorded." The report of said commissioners was read in evidence by said Modawell, showing that no slave by the name of Charles was included in said division. He also proved, that Anderson Holmes afterwards filed his accounts and vouchers for a final settlement of his administration on said estate; and that said probate court rendered a final decree on said settlement at its December term, 1854, which decree was read in evidence by said Modawell. "It appeared in evidence, also, that said slave was not mentioned or referred to in said account; and that said Anderson Holmes did not retain anything in payment of said slave on account of said alleged sale to W. C. P. Holmes."

The decree rendered on said final settlement was in the following words: "In the matter of the final settlement of the estate of W. C. P. Holmes, deceased. This day came Anderson Holmes, the administrator of said estate; and it appearing to the satisfaction of the court that due and legal notice of this final settlement of said estate had been advertised in the *Dallas Gazette*, a newspaper published in Cahaba, for three weeks previously, and that the proceedings herein are all regular, on motion it is ordered, that Lorenzo Roberts be appointed guardian *ad litem* for the minor heirs of said deceased, to defend herein on this settlement; and he, being present, consented to act. And thereupon the account-current and vouchers of said administrator were taken up, examined, contested, audited, al-

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lowed, and passed; by which said account-current it appears, that assets to the amount of \$933.47 had come into the hands of said administrator, and that he had disbursed and paid out, as per vouchers filed and numbered from one to twenty-two, inclusive, the sum of \$713.37, which, being deducted, leaves the sum of \$222.10; and it further appearing to the court that the heirs of said estate are two in number, to-wit, Mary C. Holmes, the widow, and William Holmes, the infant son of said deceased, and that another child of said deceased has died since the death of said intestate, and that the share of said deceased child falls to the share of said William Holmes, and that the said sum of \$222.10, divided into three shares, gives to each the sum of $\$74.03\frac{1}{3}$: It is therefore ordered by the court, that Mary C. Holmes have and recover of the said administrator the sum of $\$74.03\frac{1}{3}$, for which execution may issue; and thereupon said administrator files here in court the receipt of the said Mary C. Holmes, in full of her distributive share of said estate; and it is therefore ordered by the court, that said decree be, and the same is hereby, satisfied. It is further ordered and decreed by the court, that William A. Holmes have and recover of the said administrator the sum of $\$146.08\frac{2}{3}$, it being the other two-thirds of said balance; and it appearing to the court that said administrator is the legally appointed guardian of the said William A. Holmes, it is therefore [ordered] that he retain in his hands, as such guardian, the said sum of $\$146.08\frac{2}{3}$. Ordered, that the said account-current be recorded, and the vouchers filed, &c.; and that said estate be hence and forever finally settled."

"The guardian claimed to be allowed a reasonable attorney's fee, for services on said settlement; and introduced evidence showing that he was represented on said settlement by F. M. Dansby, an attorney-at-law, and that his services therein were reasonably worth two hundred dollars. This being, in substance, all the material evidence in the cause in reference to the matters in dispute, the court thereupon charged the guardian with the sum of eight hundred dollars, as the value of the negro Charles, together with compound interest thereon, and refused to allow the

guardian credit for said attorney's fee; to which rulings and decisions, separately, said guardian excepted."

The probate judge states, in his final certificate appended to the transcript, "that an appeal from the said decree was taken by W. B. Modawell, as guardian of Anderson Holmes, a *non compos mentis*, on the 24th May, 1866; and that the said William B. Modawell thereupon gave A. B. Cooper as security for the costs of said appeal, which security was approved." The assignments of error are in the name of "William B. Modawell, as guardian of Anderson Holmes," and are twelve in number. The first and sixth assignments are, the charge against the guardian of the value of the negro Charles; the second, third, fourth, and fifth, the charges of negro hire during the years 1862, 1863, 1864, and 1865; the seventh, the charge of interest; the eighth, the refusal to allow an attorney's fee; the ninth, the final decree; the tenth and eleventh, that the court had no jurisdiction; and the twelfth, the sustaining of the objection to the question propounded to Corley. The appellee submitted a motion to dismiss the appeal.

W. M. BROOKS, for appellant.

MORGAN & LAPSLEY, *contra*.

BYRD, J.—1. The appeal was taken, and security for costs thereof was given, in substantial conformity to law; and the motion of the appellee to dismiss the appeal is overruled.

2. It is contended that the probate court had no jurisdiction to settle the guardianship of a guardian who, before settlement, becomes a *non compos mentis*, upon an account filed by the guardian of the latter. There is no statute which, in express terms, confers such jurisdiction, it may be conceded. But it is argued that, under the general authority conferred by the Code on the probate court, it has jurisdiction to make such a settlement. There is no adjudication of this court which throws any light on the question, and the counsel for the parties, in their elaborate briefs, have not referred to any case or authority, in England or America, which has discussed or settled the

question or practice in such cases; and we have been unable to find any. No case or authority has touched upon the question, how the accounts of a guardian or administrator, who becomes *non compos mentis* after obtaining letters, are to be settled. No doubt such cases have arisen and been decided, but we have not found them in the books. We shall, therefore, proceed upon principle and the analogies of the law to dispose of this question.

In England, the crown originally had the right to dispose of the guardianship of all idiots and persons *non compotes mentis*; and a bailiff was appointed to take the control of the estate and person of such persons. Afterwards, by acts of parliament, the duty or jurisdiction of the appointment of a committee for such persons was conferred on the lord-chancellor, and the committee acted subject to the control of the court of chancery.

In New York, the exclusive jurisdiction over such persons and their estates is conferred on the court of chancery, and all claims or debts against them are collectable exclusively by filing a petition in the court making the appointment of the committee, for that purpose.—*In re Fitzgerald*, 2 Sch. & Lef. 451; 1 Shar. Black. Com. 303, 306; *La Moureaux v. Crosby*, 2 Paige, 422; *In re Hopper*, 5 Paige, 489. But an action may be sustained in the name of the *non compos*, to recover property belonging to him, or a debt due him, and not in the name of his committee.—*Lane & Gros v. Schermerhorn*, 1 Hill, 97; *Crane v. Anderson*, 3 Dana, 119; *Petrie et al. v. Shoemaker*, 24 Wendell, 85; *Latham v. Wiswall*, 2 Ired. Eq. 294; *Cameron's Com. v. Pottinger*, 3 Bibb, 11.

In this State it has been decided, that a *non compos* may be sued, and that the court should appoint an attorney to make defense for him.—*Walker v. Clay & Clay*, 21 Ala. 804; *Ex parte Northington*, 37 Ala. 496. But it has never been decided by this court how a suit should be brought, to recover property belonging to a *non compos*, or a debt due to him. Neither has it been settled, by statute or adjudication, how the administration or guardianship of such a person upon the estate of another is to be settled, unless the general powers conferred on the probate court by the Code does so.

There is no general and plenary jurisdiction conferred on the probate court, over the persons and estates of lunatics or persons of unsound mind. The term "orphans' business" in the constitution of the State does not include such persons or their estates. The jurisdiction is not constitutional, but purely legislative, limited, and special; that is, so far as the statute law confers jurisdiction on the probate court, it can go, but no farther.—*Rambo v. Wyatt's Adm'r*, 29 Ala. 510.

We will now notice the extent of the jurisdiction of that court given by statute, so far as applicable to the point under consideration. Section 670 of the Code confers on the probate court *original jurisdiction* to appoint and remove guardians for minors and persons of unsound mind, and to decide "all controversies as to the right of guardianship and the settlement of guardian accounts." Section 672 confers on such courts full powers to enforce the jurisdiction with which the statute law clothesthem. Chapter 3, of title 5, part 2, of the Code, (p. 385,) and chapter 11, title 2, part 3, (p. 499,) taken together with sections 670 and 672, confer all the jurisdiction the probate court has over the persons and estates of persons of unsound mind. A statute, passed since the adoption of the Code, confers jurisdiction upon the probate court to make settlement of the guardianship of a ward, after the death of the guardian, with the executor or administrator of such guardian. This statute is general, and applies to guardians of persons *non compos*, as well as other guardians.—Pamph. Acts 1853–54, page 24.

If Holmes, the guardian in this case, had died after inquisition found and appointment of a guardian for him, and before a settlement of his guardianship, it is evident that his personal representative could have settled the guardianship in the probate court, under the provisions of the statute last referred to. If Holmes had become insane, pending a final settlement of his guardianship in the probate court, on an account filed by himself while sane, it would, upon principle, have been competent for the probate court to have appointed an attorney, or to have allowed his guardian, if one had been appointed, to conduct the

settlement to a final decree. And if a guardian becomes *non compos*, without having filed an account for a final settlement, it seems to us that the probate court, under the provisions of the Code, had the authority, after inquisition found, to appoint a guardian for him, and require a bond as prescribed by law (Code, p. 500); and the court had the authority also to require, by appropriate process, (Code, § 672,) the *non compos* guardian to make a settlement of his guardianship; and after service of process, it would be the duty of the court to appoint an attorney, or his guardian, to make answer to the process and proceed with the settlement. The better practice, under our law, would be to appoint the guardian of the *non compos* to conduct the settlement; for the reason, that he is entitled to the custody of the papers and property of his ward, and has given bond for the faithful discharge of his duties, (Code, §§ 2754, 2755,) and he is also an officer of the court, *pro hoc vice*, and subject to its control.

A guardian of a *non compos*, under our Code, has substantially all the powers, and sustains all the relations, of a committee in England, though the jurisdiction of the probate court over the estate and person of the *non compos*, or over the guardian, is not as general and plenary as is that of the court of chancery in the mother country.

If, then, the *non compos* guardian could be required to settle his guardianship by the probate court, through his guardian, we see no reason why he could not by his guardian proceed to make the settlement, without awaiting the issuance of process to compel him to do so.—*McLeod v. Mason*, 5 Porter, 223. A guardian of a *non compos* may commence a suit in the name of his ward, just as a guardian of a minor might. Section 2036 of the Code does not authorize a suit in the name of the guardian in every case, nor in a case like this. The qualifying phrase, “in all cases where the ward has an interest, and the judgment enures to his benefit”, limits the cases in which the guardian *may* bring the suit in his own name.

In the case of *Beale et al. v. Coon*, (2 Watts’ R. 183,) Sergeant, J., in delivering the opinion of the court, says: “All actions by or on behalf of a lunatic, placed by law in

the care of a committee, must be in the name of the lunatic and the committee. The latter must join, to manage the interests of one who is disabled to protect himself; and the lunatic must be joined, because he may recover his understanding, and then is to have the management and disposal of his estate. He resembles, as to this, an infant, who always appears by guardian or next friend." This adjudication is altogether in harmony with our statute law on the subject, and the views we have expressed thereupon. If the *non compos* is restored to soundness of mind, the statute provides for the restoration of his property, and, of course, the discharge of his guardian; and all suits would proceed in the name of the *lunatic*, and not of the guardian. If they were commenced in the name of the latter, the statute does not provide whether they shall *abate* upon the return of sanity, or how they shall proceed to a final determination. However this may be, we hold in this case, that the record substantially shows that the account was filed in the name of the *non compos* guardian, by his guardian, and that settlement proceeded to a final decree thereon, and that the appeal, as shown in the bill of exceptions, was taken in the same manner, and the security for the costs of the appeal is in substantial conformity to law. It is true, W. B. Modawell signs the obligation for costs of appeal, as guardian of Anderson Holmes; but this is mere *descriptio personæ*, and does not designate him as the appellant. Such an obligation is sufficient, without being executed by the appellant.

Without extending this review of the decisions and statutes upon this question, we are satisfied that, upon principle and the analogies of the law, the probate court had jurisdiction to call the *non compos* guardian to a settlement, and to proceed, as above indicated, to a final decree; and having such jurisdiction, it may entertain it over an account filed by such guardian, by his guardian or committee. And such, too, we are inclined to hold, would be the law with reference to the settlement of the administration of an administrator who became *non compos* after grant of letters and before a settlement.

This view disposes of the 11th assignment of error, and

also of the 10th, in connection with the assertion that the court below properly rendered a final decree against the *non compos* guardian ; if any final decree against him should have been rendered, which will depend, perhaps, on the disposition which this court shall make of the questions raised by the other assignments of error. This conclusion, we are of opinion, is sustainable upon the authority of the case of *Walker v. Clay & Clay*, (*supra*,) and other cases cited.

3. The other assignments of error we will proceed to dispose of in the order in which they are presented on the record. The court charged the guardian with the value of a slave named Charles, who, it is contended, belonged to one W. C. P. Holmes, deceased, at his death, and upon whose estate Anderson Holmes, the guardian, administered ; and his ward, William Holmes, was a distributee of that estate. It appears that Anderson Holmes, in 1854, made a settlement of his administration upon the estate of W. C. P. Holmes, deceased, which we hold, upon the face of the decree, to be a final settlement. It further appears that, prior thereto, under an order of court, the slaves belonging to W. C. P. Holmes, deceased, had been divided among the distributees ; but no notice is taken of the slave Charles, nor was he accounted for on the final settlement.

We know of no principle of law, which authorizes the probate court, after a final decree upon a final settlement of an administrator, to charge the administrator, in any proceeding thereafter as such, or as guardian of a distributee, or in any other capacity, with assets of the estate not embraced in the settlement. That settlement is conclusive on all parties thereto, so long as it remains unreversed and in force. The final decree introduced in evidence is not void on its face, and cannot, therefore, be collaterally impeached. If the administrator fails to account for all property of the estate on a final settlement, the law provides a remedy to the distributees.—Code, §§ 1915, 1916. As to the parties to the record, a final settlement in the probate court must be treated as conclusive ; and that court has no authority to review or revise in any way its final decree, after the expiration of the term at which it is rendered.—*Slatter and Wife v. Glover*, 14 Ala. 650 ; *Watts et*

al. v. Gayle & Bower, 20 Ala. 817; *Watt's Adm'r v. Watt's Distributees*, 37 Ala. 546.

This disposes of the 1st and 6th assignments, and the 2d, 3d, 4th, and 5th, may be considered together.

4. After a careful scrutiny of the evidence, we can not see that the court erred in charging the guardian with hire of the slaves for the year 1862, 1863, 1864, and 1865, or the amounts charged for each year. On the other hand, under the evidence, we are of opinion that the decision of the court was as favorable in its conclusion on this matter to the guardian as he had any right to claim. We cannot say, upon the evidence, that, under the third section of the 26th ordinance of the convention of 1865, the court charged the appellant with more hire for those years than the appellee was "legally, justly, or equitably entitled to receive"; even if that ordinance has any application to this case; nor can we take judicial notice of the extent of the depreciation of the currency.

The only exception taken as to a charge of compound interest, was that on the value of Charles; and as appellant is not chargeable, on the evidence, with that value, it follows that he was not with the interest thereon. The 7th assignment seeks to raise a question which does not appear from the record to have been a "matter in dispute" in the court below, and we will not pass upon it.

5. The court did not err in refusing to allow attorney's fees.—*Bates, adm'r v. Vary, adm'r*, decided at present term.

As to the question propounded to the witness Corley, we deem it unnecessary to say anything, as it may not be asked again under the same circumstances or state of proof.

For the error in charging the guardian with the value of the slave Charles, the decree of the court must be reversed, and the cause remanded.

HALL & CURRY vs. BRAZLETON.

[ACTION FOR BREACH OF SPECIAL CONTRACT TO DELIVER COTTON.]

1. *Motion to quash attachment.*—By the 13th rule of practice, (Code, p. 715,) a motion to quash an attachment “must be made at the first term at which it can be made,” or it cannot be entertained.
2. *Amendment of affidavit for attachment.*—In an affidavit for an attachment at law, an averment that the writ “is not sued out for the purpose of vexing or harassing the defendant,” (Code, § 2506,) is matter of substance, and cannot be supplied by amendment.

APPEAL from the Circuit Court of Perry.

The record does not show the name of the presiding judge.

THIS action was brought by the appellants, suing as partners, against A. J. Brazleton, and was commenced by original attachment. The attachment was sued out on the 1st December, 1865, and was made returnable to the next term of the circuit court. At the May term, 1866, the defendant pleaded in abatement the insufficiency and defectiveness of the affidavit, because it failed to aver that the attachment was not sued out for the purpose of vexing or harassing the defendant; and at the November term, 1866, without disposing of the plea in abatement, the court sustained a motion to quash the attachment, on account of the insufficiency of the affidavit. The judgment of the court, quashing the attachment, is now assigned as error.

ALEX. WHITE, and JNO. T. HEFLIN, for appellants.
W. M. BROOKS, *contra*.

A. J. WALKER, C. J.—This suit was commenced by original attachment, returnable to the spring term of the court. At the first term of the court, the defendant pleaded in abatement the defectiveness of the affidavit upon which

the attachment was issued. At the next term, a motion to quash was made and sustained, the plea in abatement remaining undecided.

Two of the grounds of reversal presented by the appellants' counsel are—that the motion to quash was made too late; and that, if the motion to quash was well taken in point of time, the judgment should not have been absolute, but should have been conditioned upon the failure of the plaintiff to amend the affidavit.

1. Upon the former of those two grounds, the judgment must be reversed. The 13th rule of practice (Code, p. 715) declares, that “a motion to quash an attachment, appeal, or process, must be made at the first term at which it can be made, and not afterwards.”

2. The other ground of reversal pressed in the argument of counsel must be noticed, because it raises a question which will arise in the circuit court, if the plea in abatement should be sustained. The defect in the affidavit is the omission of the assertion, “that the attachment is not sued out for the purpose of vexing or harassing the defendant.” Can this defect be remedied by an amendment?

In the case of *Saunders v. Cavett*, (39 Ala. 51,) the matter omitted in this case was held to be material. In that case, the jurisdiction of the chancery court depended upon the attachment; and therein there is a difference from this case. The jurisdiction of the court was denied on account of the omission, which reason would have forbidden if the words omitted had been mere matter of form, and not of material substance. We therefore use the ruling of the court in that case as an authority to show that the omission was of something material, and of substance, and, under the liberal rules which prevail in chancery, not susceptible of restoration by amendment.

The authority cited stamping the defect in hand as material, and not merely formal, the question arises, as to the amendableness of a defect of such a character; and this question is to be determined, mainly, by an examination of our statutes.

Section 2561 of the Code directs as follows: “Attachments, issued without affidavit and bond *as herein prescribed*,

may be abated on plea of the defendant, filed within the first three days of the return term." The sections which prescribe the contents of the bond and affidavit are in the same title, and are referred to in the section quoted. Under this section, attachments are abatable for non-conformity to the previous sections in reference to the bond and affidavit. The subjection of attachments to abatement by the generality of phrase employed in section 2561, it was apprehended, would produce injurious consequences. Therefore that section was followed by the qualifications found in section 2562, which is as follows: "The attachment law must be liberally construed to advance *the manifest intent* of the law; and the plaintiff, before or during the trial, must be permitted to amend any defect of form in the affidavit, bond, or attachment; and no attachment must be dismissed for any defect in, or want of a bond, if the plaintiff, his agent, or attorney, is willing to give or substitute a sufficient bond."

A significant distinction is made in this section, between defects in affidavits and defects in bonds. After the amendable character of defects of form is asserted, a clause is added which provides a remedy for any defects in bonds, and even for the entire want of a bond. It is thus most obvious, that the law-making power had in its mind the distinction between form and substance.

The statute, (section 2506,) in imperative language, requires three sworn statements, before the issue of the attachment. These statements are, the amount of the debt or demand, and that it is justly due; the existence of one of the specified causes, and the negation of a purpose of vexing or harassing the defendant. No discrimination in importance and materiality, against the third of those statements, is made or suggested by the statute. The prescribed bond provides redress for falsity of it, as well as of the other statements; and if it be a matter of immaterial form, the law-maker stands convicted of degrading the solemn protection of a bond with surety, to the purpose of providing a remedy for incorrectness in a matter of form, and not of substance. Besides, the substantial materiality of it is evidenced by its very nature. The law designs to put

the conscience of the person obtaining the attachment to the precedent test of a sworn denial of a malicious or vexatious purpose. The injurious effects of an attachment usually fall upon the defendant with great promptitude; and the value of the guaranty would be greatly lessened, if it could be supplied when the mischief has been done. A man standing upon the brink of litigation might hesitate, and weigh the promptings of his conscience much more carefully, than when he is in the midst of its strife. The test is applied to the *very* person who makes the affidavit, and is designed to test his feeling at the time, and not the subsequent recollection of the emotions which governed him. Unlike the bond, it could never be supplied by any other than the person who made it; and when an agent or attorney has acted, the power of amendment would depend upon the presence and willingness of such agent or attorney to make the amendment.

Drake, in his work on Attachments, (§ 113,) refers to two decisions of this court, where it was held that attachments should not be quashed on account of the defectiveness of bonds, until the party failed to execute a perfect bond. He then proceeds to say, that "the same rule would doubtless be applied in the case of a defective affidavit." This opinion of the learned author was made without an examination of the statutes, and in reference to decisions under statutes materially different from those which apply to the present case. It should not, therefore, control our decision. The cases referred to by the author are *The P. & M. Bank of Mobile v. Andrews*, (8 Porter, 404,) and *Lowe v. Derrick*, (9 Porter, 415.) In the former of those cases, the defect in the bond was in the statement of the term of the court to which the attachment was returnable, and was not a matter of substance, but was amendable under the statute then existing, which provided a remedy where the bond was defective in form. In the latter case, there was a substantial defect in the bond; and we do not perceive how the abatement of the attachment could have been avoided, under the law as it then existed, which only allowed an amendment of defects of form, even in bonds.—See Clay's Digest, 59, § 17. At least, we do not feel willing to allow an

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analogy drawn from this decision as to a defective bond to lead us to sanction an amendment of an affidavit so materially defective as the one in hand.

In the two cases of *Lowry v. Stowe*, (7 Porter, 483,) and *Scott v. Macy*, (3 Ala. 250,) the bonds were only defective as to the statement of the return term of the attachment, and were deemed amendable.

Our conclusion is, that the defect in the affidavit is one of substance, and therefore not amendable. This conclusion is based upon the construction of our statutes, which extend the power of amendment only to defects of form. No English decision, which has been brought to our attention, reflects any light upon the construction of our statutes and the deduction of a proper rule of practice under them.

Reversed and remanded.

McEACHIN vs. REID.

[CONTEST BETWEEN JUDGMENT CREDITOR AND GARNISHEE.]

1. *Lien of garnishment destroyed by decree of insolvency.*—If the defendant in a pending suit dies, and his estate is regularly declared insolvent, before the rendition of judgment, the lien acquired by the previous service of a garnishment is thereby destroyed, and no judgment can be rendered against the garnishee. (BYRD, J., *dissenting.*)

APPEAL from the Circuit Court of Perry.

Tried before the Hon. JAMES COBBS.

THE appellee in this case commenced suit by summons and complaint, on the 15th February, 1861, against Laton Sanders; and on the same day sued out process of garnishment against the appellant, as the debtor of said Sanders. The defendant having died pending the suit, (the record does not show at what time,) a *scire facias* was issued

to Obadiah Belcher, as his administrator; and at the November term, 1866, a judgment was rendered against said administrator, for the amount of the plaintiff's debt; but "the plea of insolvency being confessed," as the judgment-entry recites, it was ordered that the judgment be certified to the probate court, and that no execution be issued on it. At the same term, the plaintiff asked for a judgment against the garnishee on his answer, previously filed, admitting an indebtedness to the defendant; while the garnishee moved the court to discharge him, in consequence of the declaration of insolvency of the defendant's estate. The court overruled the motion of the garnishee, and rendered judgment against him, on his answer, for the amount of the plaintiff's debt; to which the garnishee excepted, and which he now assigns as error.

J. R. JOHN, for appellant.

R. W. COBB, *contra*.

JUDGE, J.—The effect of a decree of the probate court declaring an estate insolvent, is to transfer to that court the exclusive jurisdiction of all claims against the estate, subject only to the provisions of the Code as to pending suits. *Edwards v. Gibbs*, 11 Ala. 292; Code, §§ 1859, 1860.

Any suit pending at the time of the declaration of insolvency, is sustained for the single purpose of a judicial ascertainment of the amount due, if anything, on the claim involved in the litigation; and while a judgment may be rendered for the amount ascertained to be due, no execution can be issued on the judgment, but it must be certified to the proper probate court, for allowance as a claim against the estate.—Code, § 1860.

Such being the effect, under our legislation, of a declaration of insolvency, what becomes of a lien that may have been acquired in a suit pending at the time of the declaration, either by the levy of an attachment, or the service of a writ of garnishment? Such liens are expressly created by section 2527 of the Code.

Goods or chattels attached may be replevied; and when replevied, if not delivered within thirty days after judgment

against the defendant, it is the duty of the sheriff to return the replevin bond forfeited, and execution must issue thereon, against the principal and sureties therein, for the amount of the judgment and costs.—Code, § 2538. But, if the defendant dies, and his estate is declared insolvent, before the rendition of the judgment, no execution, as we have seen, can be issued thereon. How, then, can this bond be forfeited, or the lien of the plaintiff enforced? The prohibition against the issue of an execution is, in effect, a denial of all power to the court in which the judgment was rendered, to take any remedial step for the enforcement of the lien. That court is restricted to the simple duty of certifying the judgment to the probate court, which then has exclusive jurisdiction of the case, for certain well-defined statutory purposes, and has not the power, by any process with which we are acquainted, to enforce the lien, if it continued to exist, but which, under the circumstances, is discharged.

A lien, acquired by the service of a garnishment, cannot, on principle, occupy a footing more favorable, than one acquired by the levy of an attachment. A judgment against a garnishee is dependent upon the judgment against the principal debtor. If the right does not exist to enforce the collection of the latter, it cannot exist to coerce the payment of the former. The measure of the right to satisfaction of a judgment rendered against an estate, after a declaration of insolvency, is definitively fixed by the law, as well as the forum in which it is to be enforced; and, as in such case no execution can issue against the insolvent estate, so none can issue on an incidental judgment against a garnishee in the case, without sanctioning an effort to accomplish by indirection that which the law prohibits from direct accomplishment, viz., the satisfaction of the principal judgment by proceedings of the court in which it was rendered. There is no statutory provision authorizing the transfer of the lien to the probate court; and that court would be as much without jurisdiction to enforce such a lien, as it would be to enforce a lien acquired by the levy of an attachment.

The lien acquired by the service of the garnishment, in

the case before us, was inchoate and imperfect; and before it was perfected by the rendition of a judgment against the principal debtor, on which execution could issue, was intercepted by the declaration of insolvency of his estate, the effect of which was to abate the garnishment proceeding.

Our conclusion in the premises is sustained by the authority of numerous adjudications of this court, to the effect that a decree of insolvency destroys inchoate and imperfect liens, similar to that which appellee acquired. This doctrine has been too long the settled law of this State to be now disturbed. — *Hale v. Cummings & Spyker*, 3 Ala. 398; *Fitzpatrick v. Edgar*, 5 Ala. 503; *Burke v. Jones*, 13 Ala. 171; *Langdon v. Raiford*, 20 Ala. 538; *Lamar v. Gunter*, 39 Ala. Rep. 324.

The court below erred in not discharging the garnishee; and the judgment must, therefore, be reversed, and the cause remanded.

BYRD, J.—The Code gives a lien on the assets of a debtor, in the hands of a garnishee, upon the service of process of garnishment. If the estate of a debtor is declared insolvent, against whom a suit was pending at his death, under the Code the suit is not abated, but proceeds to trial; and if the creditor procures a judgment, the Code requires the judgment to be certified to the probate court.

All the decisions referred to in the opinion of the court on the question involved in this case were made under a statute which abated the suit upon a declaration of insolvency; and I concede the correctness of those adjudications, because it requires the rendition of a judgment to perfect the lien of the attachment or garnishment. Whenever the plaintiff obtains a judgment, the lien is perfected, and becomes a vested right; and in the leading case upon which the subsequent ones are based, the court (Goldthwaite, J., delivering the opinion) says of the lien: "It is inchoate and imperfect until a judgment is rendered, for it is that alone which determines the claim on which the attachment rests to be just." * * * "It is because the law declares that no suit shall be sustained after the estate is represented insolvent, that the lien is gone.—See *Hale, adm'r &c. v. Cum-*

mings & Spyker, 3 Ala. 400. This case fully sustains the position I take, that a creditor who sues out an attachment, and levies it upon property or assets of the debtor in the hands of a third person, obtains a lien on such property or assets, which, upon a judgment against the debtor, becomes a perfect lien, and a vested right, which is not defeated because the law requires the judgment to be certified to the probate court, if the estate of the debtor is declared insolvent before judgment, and that no execution can issue on the judgment.

The codifiers, and the legislature, saw the injustice that was worked to honest creditors who had done all the law required to obtain a lien, by the abatement of the suit; and therefore the law was changed by the Code, and the suit was allowed to proceed to judgment. It seems to me to be wrong to deprive a creditor of a legally acquired right by judicial construction or legislative action. Whether rights have vested under the statute law, the common law, or by contract, makes no difference. They are all equally sacred, and above the sphere of legislative power, and should be above that of the judicial or executive. My views on this subject are fully given in the case of *Dockery v. McDowell*, decided at the present term.

To illustrate: Suppose an attachment is levied on perishable property, and the debtor replevies it, and consumes it before his death; and afterward, before judgment, his estate is declared insolvent, and the suit proceeds to judgment, and is certified to the probate court; are the sureties on the replevin bond released from their liability because the debtor's estate is insolvent. If the creditor cannot sue them on the replevin bond, when the property is not delivered within thirty days after judgment as required by law, certainly no one else can do so; and the creditor is defeated of his lien and rights *without any negligence or fault* on his part; and if the debtor had no other property at his death, the creditor will be wholly without remedy. Or, suppose perishable property is levied upon, and sold by the sheriff, and he has the proceeds at the time judgment is rendered; is the creditor to be deprived of his legally acquired and vested lien, by a declaration of insolvency?

Certainly not, and the circuit court could order the application of the proceeds of sale to the payment of the judgment; and if not sufficient, should order the balance certified to the probate court; or should apply the proceeds as a credit on the judgment, and have it certified.

The Code gives an express lien on the assets in the hands of the garnishee, (Code, § 2527,) and although no execution can issue on the judgment against the administrator of the insolvent estate, yet that should not prevent the creditor from obtaining a judgment against the garnishee; and after collecting the money from him, the amount should be allowed by the probate court on the judgment; and if not sufficient to pay it, the balance of the judgment should be allowed by the probate court.

The law ordinarily favors the diligent, and never favors the deprivation of any suitor of a lawfully acquired right.

Many other views might be presented to maintain the position taken, but I shall not present them, nor refer to any other authorities than those cited in *Dockery v. McDowell*, *supra*, and *Howard v. Bugbee*, 24 How. 261.

I therefore dissent from the opinion of the court.

BETHEA'S EXECUTOR *vs.* SMITH.

[DETINUE FOR SLAVE.]

1. *Bequest to "heirs," with limitation over in event of death "without leaving lawful issue."*—Under a devise and bequest of property "to be equally divided among my heirs," "and in the event of the death of either, without leaving lawful issue," his portion "to be equally divided among the surviving heirs," the limitation over is not too remote.
2. *Assent to legacy.*—Where property is devised and bequeathed by a testator, to 'be equally divided among his heirs', 'and in the event of the death of either, without leaving lawful issue, that his portion shall revert to, and become a portion of the estate, and be equally divided among the surviving heirs', the executor's assent to the

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legacy to the first taker enures to the benefit of the persons who are to take under the limitation over; and on the happening of the specified contingency, the legal title passes directly to them, and does not revert to the estate.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JNO. K. HENRY.

THIS action was brought by Abijah Miller, as executor of the last will and testament of David Bethea, against Malcolm W. Smith, to recover a negro woman by the name of Zena, together with damages for her detention; and was commenced on the 8th September, 1860. The plaintiff claimed the slave under the sixth clause of the testator's will, which is copied in the opinion of the court; while the defendant claimed under a purchase from John W. Bridges, whose wife, Mrs. Elizabeth Bridges, was a daughter of said testator. It was admitted that, on a division of the property, in 1847, under the sixth clause of the will, the slave was allotted to Mrs. Bridges, and continued in the possession of herself and her husband until sold by the latter, during the life of his wife, to the defendant; and that Mrs. Bridges died, in October, 1858, "leaving no child." The court charged the jury, "that under the provisions of said will, Mrs. Bridges took an absolute estate in the slave, the remainder over being too remote, and that the plaintiff could not recover in this action." The charge of the court, to which the plaintiff excepted, is the only matter assigned as error.

PETTUS & DAWSON, for appellant.—The words "without leaving lawful issue," in the sixth clause of the will, are a limitation to issue living at the death of the first taker; and the words "surviving heirs," in the same clause, have the same effect. In executory devises of personal property, the courts will struggle to limit such general expressions, and confine them to issue living at the death of the first taker.—*Fearne on Remainders*, (4th Amer. ed.,) m. p. 472; *Peak v. Pegden*, 2 Durn. & East, 720; *Porter v. Bradley*, 3 Durn. & East, 143; *Doe v. Jeffrey*, 7 Durn. & East, 589; *Cudworth v. Thompson*, 3 Dess. 256; *Anderson v. Jackson*,

16 Johns. 382; *Flinn v. Davis*, 18 Ala. 132; *Isbell v. Maclin*, 24 Ala. 315; *Roberts and Wife v. Ogbourne*, 37 Ala. 174; *Bell and Wife v. Hogan*, 1 Stewart, 536.

S. J. CUMMING, *contra*.—1. The limitation over is void, because it is repugnant to the prior absolute gift.—*Moody v. Walker*, 3 Ark. 188, and cases there cited; *Patterson v. Ellis*, 11 Wendell, 299, and cases cited; *Flinn v. Davis*, 18 Ala. 132.

2. The limitation is void, also, for remoteness.—*Burford v. Lee*, Freeman's Chan. Cases, 210; *Campbell v. Harding*, 2 Russ. & My. (13 Eng. Ch.) 90; *S. C.*, 2 Clark & Fin. 421; 1 Madd. 264; 6 Brown's P. C. 450; *Moody v. Walker*, 3 Ark. 187; *Patterson v. Ellis*, 11 Wendell, 259; *Flinn v. Davis*, 18 Ala. 132; *Mason v. Pate's Executor*, 34 Ala. 379; *Parish v. Parish*, 37 Ala. 591.

3. By statute in this State, (Clay's Digest, 157, § 37,) estates-tail are converted into estates in fee; and the same rule applies to personal, as to real estate.—12 Wheaton 568; 18 Ala. 132; 34 Ala. 379.

BYRD, J.—The appellant, as executor of the last will and testament of David Bethea, deceased, instituted this suit, to recover of the appellee a slave, and predicated his title upon the will, the sixth clause of which is in these words: "It is my will and desire, that all the residue or remainder of my property, both real and personal, be divided equally among my heirs, my wife excepted, whose portion has already been set apart; and in the event of the death of either, without leaving lawful issue, that their portion of my estate herein bequeathed shall revert to, and become a portion of my estate, and be equally divided among the surviving heirs."

The record shows that the slave sued for was received by a child of the testator, in 1847, upon a division of the property bequeathed by the above clause of the will; and that she afterwards "died, leaving no child." A person may die "leaving no child," and yet leave issue. But taking the word "child" in the sense of "issue," without intimating that such is its meaning, we will proceed to the

consideration of the main question presented by the bill of exceptions.

The appellee contends, that the limitation over in the event of the death of the first taker, "without leaving lawful issue," is void, and that the first taker took an absolute estate in the slave. This question has been discussed with great learning in the books, and many adjudications have been made upon it, variant and conflictive. We do not propose to enter upon a review of them. Many difficulties have arisen, and great nicety of discrimination is required, in the correct application of the rule in *Shelley's case*, and the rules of law with reference to executory bequests and devises, perpetuities, and fees conditional, to testamentary limitations of real and personal property.

At common law, an estate in fee to land could be limited upon an estate in fee to the same, by way of executory devise. By the ancient common law, an absolute estate in personalty could not be limited upon a life-estate therein, much less upon a prior absolute estate. But, in the progress and expansion of the principles of the common law, to accommodate themselves to the advancing dignity of personal property during the last millennium, the courts, where the common law prevailed, have ceased to make any material distinctions between limitations over of real and personal property, except as to fees conditional, or estates-tail, if either can be *strictly* denominated a limitation. It may be that a limitation over of some species of personalty may not be authorized by law, when, if it were of land, it would be. We state only a general rule, and not the exceptions, if any. Our recognition of the rule is sustained by the following authorities: Keyes on Chattels, ch. 2, § 23, and *post*; *Flinn v. Davis*, 18 Ala. 132; *Jemison v. Smith*, 37 Ala. 185; and see the authorities cited by Chancellor Keyes, in his very learned and critical work on the Law of Chattels, ch. 2; and by the court in the cases cited.

In this case, it may be that an absolute estate is given to the first taker; but, if so, it is defeasible upon a contingency expressed in the will; and that is, the dying of the first taker without leaving issue; and on the happening of

this contingency, then over. This is now tolerated by the law, if the persons who take the second estate are designated, and can take as purchasers. The words "my heirs," and "the surviving heirs," in the above clause of the will, are not words of limitation within the meaning of the rule, in *Shelley's case*, nor has that rule any application to this case. The meaning of those words may be ascertained, so far as the law can do so on the face of the will, by the principles settled in the following cases: *Flanagan v. The State Bank*, 32 Ala. 508; *Shackleford v. Bullock*, 34 Ala. 424; *Williams v. McConico*, 36 Ala. 28; *Jemison v. Smith*, 37 Ala. 185, and the authorities cited in the above cases.

The words, "*in the event of the death of either without leaving lawful issue*", refer to the persons who take under the words "my heirs", and do not import an indefinite failure of issue, but issue living at the death of each of the first takers, or not then in existence. *If any*, the limitation over does not take effect; *if none*, it does take effect. The rule against perpetuities is not infringed by this clause of the will.—Roper on Legacies, 1546; *Flinn v. Davis*, (*supra*), and authorities cited in the very able opinion of Chief-Justice DARGAN; *Powell v. Glenn*, 21 Ala. 458; 24 Ala. 322; 34 Ala. 369; 35 Ala. 712.

These views being in conflict with the ruling of the court below, the cause will be reversed, unless the appellant is not entitled to recover upon the title he sets up and claims under.

2. The appellant had assented to the legacy to the first taker—a daughter of the testator—and the slave had been delivered into her possession. Do the words, "*revert to, and become a portion of my estate, and be equally divided among the surviving heirs*", reconvey any title to the executor, he having assented to the legacy, and delivered the property to the first taker? These words do not, *ex vi termini*, vest any title in him. If they confer any title, it is by implication. But these words perform another office, and can be given effect without assigning to them the office of conferring on the executor the title to the property. They serve to show that the testator desired the *ultimate limitees* to receive the property directly from him, and not from the first taker,

and to limit the words "leaving lawful issue" to such issue living at the death of the first taker, and not an indefinite failure of issue.

After the legacy, by the assent of the executor, had vested in possession in the first taker, his title was at an end, and his assent enured to the benefit of the ultimate limitées, upon the happening of the contingency upon which their title was to become a vested one; and the law favoring the vesting of an estate in ultimate limitées, as against a *reverter*, the courts, in such and similar cases, treat the estate as vested in the parties beneficially entitled, as is done in the case of a mere naked or barren trust.—*Heirs of Capel v. McMillan*, 8 Porter, 202; *Thrasher v. Ingram*, 32 Ala. 645; *Camp v. Coleman*, 36 Ala. 163; *Hill v. Chaffee*, 14 N. H. 215; 1 Roper on Leg. 844, 849–50; *Cox v. McKinney*, 32 Ala. 461; 8 Porter, 529.

The case of *Thrasher v. Ingram*, *supra*, bears directly upon this question; and the case of *Hall v. Chaffee*, *supra*, furnishes a strong analogical argument in favor of the view taken of the effect of the clause last recited, upon the title to the slave in controversy. In that case, the language of the will was very like that used in the case before us; and the main distinction is, that in that case land was the subject of devise, and in this realty and personalty. In that case, the court held that the estate vested in the ultimate limitée upon the happening of the event upon which it was to vest. In this case, we see no reason why any distinction should be made, as to the vesting of the legal title, between the real estate devised and the personalty bequeathed by the sixth clause of the will. If the one vests in the ultimate limitée, there is no reason why the other should not do so likewise. If this limitation of personalty was void at the ancient common law, and has only in modern times been upheld upon the analogies to such limitations of realty, we see no reason, and are not aware of any principle, which would forbid the application of the rule with respect to the vesting of the legal title in the limitations of realty to such limitations of personalty. A different rule of construction would, in this case, vest the title to the realty in the ultimate limitées, and the title to the personalty would vest in

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the executor. Not being able to find any authority to maintain such a distinction, upon reason, principle, and authority, we hold that, in this case, the executor has shown no title in himself under the will of David Bethea upon which he can maintain this suit.

It is therefore unnecessary to reverse and remand this cause, and the judgment of the court below must be affirmed.

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[FINAL SETTLEMENT OF ACCOUNTS OF DECEASED ADMINISTRATOR.]

1. *Delivery essential to parol gift.*—Delivery, actual or constructive, is necessary to perfect a parol gift of a chattel, or of a chose in action; and where the delivery is constructive merely, the donor's intention to part with the title and dominion of the subject of the gift, in favor of the donee, must be clearly manifested.
2. *Payment of debts by executor or administrator.*—If an executor or administrator pays the debts of the decedent's estate, either with his own funds, or with the funds of the estate, the payment operates an extinguishment of the debts so paid, and entitles him to a credit, on final settlement, for the amount so paid; but he may, for a valid consideration, waive his right to a credit or reimbursement for the moneys so paid, in favor of the distributees of the estate; and in this case, his precedent declarations of his intention to use his own Confederate money in payment of the debts of the estate, for the benefit of the widow and children of the decedent, who was his brother, and his death-bed declarations that he had done so, were held sufficient to show such waiver on his part, and to deprive his personal representative, on final settlement of his administration, of the right to claim a credit for such payments.
3. *Retainer by executor or administrator.*—An executor or administrator, having paid debts as surety for the deceased in his life-time, may retain the amount so paid out of the trust funds which come into his hands, when the estate is solvent; and is entitled to a credit for such payments, on final settlement of his accounts.
4. *Compensation and commissions.*—The refusal of the probate court to allow commissions or compensation to a deceased administrator, on final settlement of his accounts by his personal representative, is, at most, error without injury, when the record shows that he was

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allowed to retain in his hands, without accounting for, a sum larger than the commissions or compensation to which he would have been entitled.

5. *Allowance of counsel fees.*—To entitle an executor or administrator, on final settlement of his accounts, to a credit for attorney's fees, he must show that he has paid them.

APPEAL from the Probate Court of Perry.

IN the matter of the final settlement of the accounts and vouchers of John H. Jones, deceased, as administrator of the estate of Robert H. Jones, deceased, by F. A. Bates, the administrator of said John H. Jones. Robert H. Jones died on the 11th October, 1864, and letters of administration on his estate were granted by said probate court, on the 18th November, 1864, to said John H. Jones, who was his brother; and on the 18th November, 1865, after the death of said John H. Jones, letters of administration *de bonis non* on the estate of the said Robert H. were duly granted to John F. Vary. On the 11th December, 1865, F. A. Bates was appointed administrator of the estate of said John H. Jones; and on the 12th January, 1866, he filed his accounts and vouchers for a final settlement of his intestate's administration on the estate of said Robert H. Jones. Objections to the allowance of various items in the account, as stated, were filed on the part of the distributees and the administrator *de bonis non*; and the final settlement was had, after several continuances, on the 24th April, 1866. All the facts of the case are stated in the decree of the court, and in the bill of exceptions reserved on the hearing by said F. A. Bates.

The decree, after stating the various continuances, the appearances of the parties, &c., proceeds thus:

"A. McKellar testified, that soon after Dr. John H. Jones became administrator of the estate of Robert H. Jones, he told witness that he did not know whether the estate was solvent or not, and that he thought of selling the property of the estate right away, and settling up the estate; that at another time, afterwards, he told witness that he intended to pay the debts of the estate, and to let the widow and children have the benefit of it—that he would start them

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out of debt, and he thought they could then make a living ; that at another time, still subsequent, he told witness that he did not see what better he could do with his Confederate money, than to pay the debts of the estate with it, and let the widow and children have the benefit of it ; that he told witness, after the surrender, that he had paid all the debts of the estate he could with Confederate money, and that there were two debts where they would not take Confederate money—one in Mobile, and one in Marion.

“C. O. Jones testified, that J. H. Jones told him that he intended to pay all the debts of the estate he could with Confederate money, and let the widow and children have the benefit of it ; that he told witness so several times ; and that he often told witness that he intended to pay all the debts of the estate he could with Confederate money, and did not expect to get any thing for it ; that (he) witness recollected distinctly one time, when he told witness that he was going to pay all the debts of the estate he could with his Confederate money, and did not expect to get any thing, and did not want any thing for it—that he regarded the money as worthless, or thought it would be worthless ; that he advised witness to pay the debts of an estate which witness represented, with Confederate money, and offered to let him have all the money he wanted for that purpose, and told witness that he need not give him any note or showing for it, and if the money went up he need not ever pay him any thing for it ; that in the winter of 1864–5 he told witness he had about eighty thousand dollars in Confederate money.

“T. D. Jones testified, that J. H. Jones told him he intended to pay the debts of the estate, if he could, in Confederate money, and let the widow and children have the benefit of it ; that he told witness so several times ; and that after the surrender he told witness he had paid all the debts of the estate he could with Confederate money. Woolley testified, that J. H. Jones requested him to release him from a bond of about twenty-five thousand dollars which he had given on account of witness as overseer under the Confederate law ; that he gave witness as a reason for making the request, that he would have to pay a good deal

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on the bond, but he wanted to pay the debts of the estate, and give it to the widow and children; that witness complied with his request, and released him from the bond by going into the army of the Confederate States.

"Dr. J. F. Blevins testified, that he had a conversation with Dr. J. H. Jones, in which he referred to what some persons were saying about his paying the debts of the estate with his Confederate money, and said he did not care what others said or thought about it—he was going to pay all the debts he could with his Confederate money, and let the heirs have it. Mrs. Rachel Jones, the mother of Dr. J. H. Jones, testified that, after the surrender, and but a short time before his death, he told her that he had done all he could for them—that he had intended to educate the children, but now he could not do it; that he said he intended to give his property to her and his sister Harriet.

"Charles O. Jones testified, that he was present in the bed-room of Dr. J. H. Jones, a few hours before his death, in company with Mrs. Sallie E. Jones, widow of Robert H. Jones, deceased, and others; that Dr. Jones said to Mrs. Jones, that he had been accused of taking the estate of Robert for the purpose of speculation, 'But,' said he, 'you see what I have done—I have paid off all the debts of the estate, except about five thousand dollars, and that I could not pay with Confederate money; you must now look to some one else to take care of you.' A. Marshall testified, that he was present, also, at the same time referred to by Chas. O. Jones, and heard Dr. J. H. Jones say substantially the same as above; adding that he, Dr. Jones, said he had always regarded Mrs. Robert Jones as a sister.

"It was proved that Dr. J. H. Jones owned about eighteen hundred acres of black land, which is worth in present currency, at the time of this trial, from thirty to thirty-five dollars per acre; that in 1864, and up to the time of the surrender, he owned upwards of one hundred slaves; that he owned between thirty-five and forty mules, and several horses, between sixty and seventy head of cattle, some very fine and valuable blooded stock, over two hundred head of hogs; also, sheep and goats, farming utensils, &c., &c.; that he had, in 1864, one hundred bales of cotton, which

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were still on hand. It was in proof, also, that Dr. J. H. Jones had neither wife nor child; that Robert was his youngest brother, and the last that died; and that Robert was his only brother who left a wife or any child surviving. It was in proof, also, that Mrs. Rachel Jones, the mother of Dr. J. H. Jones, lived in the county, about two miles from the town of Marion; that she had a son, named Thomas, who died in 1862, and who lived near her for several years previous to, and at the time of his death, their houses being separated only by a road passing between them; that the place at which Thomas lived was called the 'Wiley place', and after the death of Thomas belonged to Dr. J. H. Jones; that Robert was then living, with his family, at his own house, on his farm; and that Dr. J. H. Jones requested him to leave his own place, and move with his family to the said 'Wiley place', so as to be near his mother, and also to protect said place; and that Robert, at the request and solicitation of his brother John, did move with his family to the said 'Wiley place', in October, 1862, and lived there until his death, which took place about the 11th of October, 1864; that he left, him surviving, his wife, Mrs. Sallie E. Jones, and three children, viz., William, then about five years old, Ella, about two years old, and Elizabeth, an infant; that Robert had, at the time of his death, a farm of about eight hundred acres, which lay adjoining the land of his brother John, and was of about the same value per acre; that he had nine mules, about — head of cattle, — hogs, a dozen sheep and goats, about fifty-five bales of cotton, twenty-seven slaves, old and young, and farming utensils, &c., &c.; that his dwelling-house was about a half-mile from the dwelling-house of his brother John; that John had much affection for his brother Robert and his family, and also for his mother, Mrs. Rachel Jones, and for his sister Harriet, who was still unmarried and afflicted. It was in proof, also, that Dr. J. H. Jones did not, at the commencement of the year 1865, or at any time, hire out any of the negroes, or rent out any of the land; that he did not at any time sell any of the property of the estate to pay debts, or for any purpose; nor did it appear that he did at any time institute any proceedings.

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whatever for the sale of any property of the estate, for any purpose whatever ; that as negroes were selling in January, 1865, for Confederate money, the negroes alone of the estate would have sold for, or were worth, about one hundred and fifty thousand dollars in Confederate money. It appeared that Dr. Jones died on or about the 2d day of September, 1865.

“From the foregoing testimony, it appears to the court that said J. H. Jones designed, intended, and determined, to pay the debts of the estate, or at least so much thereof as he could, with his Confederate money, as a gratuity for the benefit of the widow and children of his deceased brother Robert ; that he did not sell, or institute any proceedings for the purpose of effecting a sale, of any of the property of the estate to pay debts, because he had designed, intended, and determined, to pay the debts of the estate with his own means, or with so much of his own means as might be necessary for that purpose, as such gratuity ; that the course which he adopted and pursued, and all he did in reference to the estate, and in the management or administration thereof, was adopted, pursued, and done by him, under and in pursuance of said design, intention, and determination ; and that all the payments of debts against the estate, which he made in his life-time, with his own means, were designed, intended and made by him, as such gratuity ; and such payments having been made by him as such gratuity, the court holds and rules, that no claim or demand can now arise, or be allowed therein by the court, in favor of said J. H. Jones, or in favor of his estate, against the estate of Robert H. Jones. The money of the estate, which he received, and with which he is charged on the debit side of said account, was Confederate money ; and the court considers that he paid out this Confederate money in the payment of debts ; and being charged in said account with this Confederate money, he must be allowed a credit on the credit side of the account, equal to the amount of said debits. If commissions were to be allowed on these receipts and disbursements of Confederate money, then the real value of such Confederate money, in good and lawful money, must be ascertained, in order to fix the amount of

commissions ; but, under the testimony, the court considers that he received and paid out this Confederate money under the same design, intention, and determination above mentioned ; and that, therefore, this is not a case in which commissions can be allowed ; and none will be allowed by the court in this case in favor of said J. H. Jones.

“In the above ruling of the court, all the debits, or items on the debit side of said account, and all the credits on the credit side thereof, from item No. 1, to item No. 50, inclusive, are embraced. In regard to items Nos. 49 and 50, being the rent of the ‘Wiley place,’ the court considers that, if J. H. Jones really set up any such claim for rent, he paid the same to himself, out of the funds which are shown by the debits entered in said account as having come to his hands. But, in regard to these two items, it appears to the court that R. H. Jones moved to the ‘Wiley place’ at the invitation and request of his brother John, so as to be near his aged mother, and also so as to protect in some measure the said ‘Wiley place ;’ and the court does not discover anything in the evidence, inducing the court to conclude that John expected to charge, or that his brother Robert expected to pay any rent therefor. It appears that in April, 1864, J. H. Jones gave Robert a note, or due bill, in consideration of bacon ; but there is no evidence that Robert gave any note for the rent, or made any agreement, in writing, or verbally, to pay rent ; nor that John made any charge against him for the rent. After the surrender, John stated that he had paid all the debts he could with Confederate money, and referred to the debts which remained unpaid because he could not pay them with Confederate money ; but it does not appear that he included these items for rent among the unpaid debts. His statement to the witness McKellar, that he intended to pay the debts of the estate, and let the widow and children have the benefit of it, and that he would start them out of debt ; of itself, in the opinion of the court, tends to show that he did not charge or claim any rent, and did not intend the estate to pay any rent therefor. Under the testimony, it appears to the court that, in this settlement, no claim can be allowed

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to arise out of said items for rent, in favor of J. H. Jones or his estate, against the estate of R. H. Jones.

"The administrator of J. H. Jones moves the court to allow one thousand dollars for the fees of his attorneys, J. H. Chapman, and Moore & Brooks, for professional services rendered by them in this settlement. The court does not question the propriety of the action of said administrator in the employment of counsel; and if such employment is proper, he certainly ought to be allowed such reasonable fees as his attorneys may charge him for their services. The services for which this fee of one thousand dollars is charged, were rendered, chiefly, in the endeavor to establish a claim or demand in favor of the estate of J. H. Jones, against the estate of R. H. Jones, arising out of the matters above disposed of. These services, so far as any such claim is concerned, were rendered entirely for the benefit of the estate of J. H. Jones. The administrator, Bates, may have had in view, in the employment of said attorneys, his own protection, as well as the interests of the estate he represents; and these services may have been rendered, as well for his protection, as for the interests of that estate. The court considers that, acting in a fiduciary capacity, and in good faith, he is entitled to be protected. But it must be at the expense of the estate for whose interests he is acting; and it appears to the court that the fees for such services are properly chargeable against the estate which he represents, and certainly not against the estate of R. H. Jones. The said one thousand dollars, being item No. 54, for said attorneys' fees, is therefore disallowed.

"The items No. 51, one hundred and eleven dollars for bagging and rope; No. 52, two hundred and eleven 25-100 dollars for board of mules; No. 53, one hundred and seventeen dollars for fodder, are allowed by the court; and the further sum of two hundred and ninety-five 50-100 dollars for costs is also allowed, amounting in all to the sum of seven hundred and thirty-four 75-000.

"And the court now proceeded to state said account, in accordance with the foregoing testimony and rulings of the court; whereupon, it appears to the court, that the debits entered on the debit side of said account amount to the

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sum of twenty-two thousand six hundred and forty 08-100 dollars, with which said J. H. Jones, administrator as aforesaid, is chargeable; that the credits entered from item No. 1 to item No. 45, inclusive, amount to the sum of thirty-eight thousand and nineteen 64-100 dollars, out of which said administrator is entitled to be, and he hereby is, allowed a credit of thirty-eight thousand and nineteen 64-100 dollars; leaving a balance of fifteen thousand, three hundred and seventy-nine 56-100 dollars; that said balance, having been paid by said J. H. Jones, as a gratuity, as heretofore shown, be, and the same is, hereby disallowed. It appears to the court, that the estate of R. H. Jones is indebted to the estate of J. H. Jones in the sum of seven hundred and thirty-four 75-100 dollars, now stated in said account, the same being the amount of said items numbered 51, 52, 53, and 55, on the credit side of said account, which are allowed by the court, as hereinafter appears; and it appearing to the court that said account, so stated as aforesaid, is correct and just, it is ordered, adjudged, and decreed by the court, that said account, so stated, be, and the same hereby is, passed and allowed, and that the same be recorded and filed."

"On the trial of the cause," as the bill of exceptions states, "it appeared in evidence that voucher No. 36 on the credit side of the account was a bill of exchange, drawn by Robert H. Jones, on the said John H. Jones, and by said John H. Jones accepted, dated January 6th, 1864, and payable ninety days after date, to the order of N. V. Wyatt. This bill was introduced in evidence. Said Wyatt, being introduced as a witness, testified that, a short time before the bill was given, Robert H. Jones called on him, at Marion, and asked him if he would lend him (Robert H. Jones) some money; and that he replied, that he would, if he would fix him up a good bill, which Jones said he would do. Wyatt further testified, that in a few days afterwards, Robert H. Jones brought him the bill above stated, and gave it to him for Confederate money, which he then lent to said Robert H. Jones; and that on the 22d July, 1864, said John H. Jones, the acceptor, paid to witness the sum of five thousand four hundred and sixty 85-100 dollars, the

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amount of principal and interest due on said bill, in satisfaction thereof.

“ Vouchers Nos. 37, 38, 39, 40, 41, 42, 43, 44, and 45, on the credit side of said account, were shown to be for just debts owing by Robert H. Jones at the time of his death, to his mother, Rachel M. Jones. Six of said debts were in promissory notes executed by said R. H. Jones, and payable to R. M. Jones, and the others by account, some of which were contracted before, and some after the State seceded. The notes and accounts had receipts on them signed by said Rachel M. Jones, bearing date the 28th March, 1865, whereby she acknowledged that she received payment of said debts from John H. Jones, administrator of Robert H. Jones, deceased. Mrs. Rachel M. Jones, the payee in said notes and owner of said debts, being introduced as a witness, testified, that said John H. Jones was her son and agent; and that on the 28th March, 1865, she signed said receipts and accounts at his request, and upon his promise to pay her; and that she looked to him, and not to the estate of Robert H. Jones, for payment; but that she had never been paid anything. On cross-examination by contestants, she further testified, that at the time she signed the said receipts, her son John did not pay any money over to her; that he kept all her money, notes, and papers, for her, and attended to her business; and that he did not give her any note, or obligation in writing to pay her the money, or showing that he owed her the money. On the rebutting examination she testified, that John died without having made any settlement between them.

“ Squire Lowrey testified, in reference to voucher No. 38, which was a promissory note, that it was a note given for the debt of Robert H. Jones, and was signed by him, and by Mrs. R. M. Jones, as his surety; that Robert himself in his life-time paid the note, with interest, in Confederate money, the amount being fifteen hundred and ninety-three 87-100. Mrs. Rachel M. Jones testified, in regard to this note, that she furnished the money to Robert to pay the note; that she told John to let Robert have the money for her, with which to pay it, and that John did so; that Robert took the money, and went and paid the note, and then gave the

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note to John, to keep for her, and as her showing for the money.

"It was proved that Messrs. Chapman, Moore, and Brooks, attorneys at law, were employed by F. A. Bates, the administrator in this case; that they duly and properly attended to the case, assisted in preparing the account and the cause for trial, and attended to the same, and advised and counselled the administrator in the matter, and that their services were reasonably worth the sum of two thousand dollars; and the said administrator claimed that the court should allow him one half of said sum as a credit upon his said account, and also claimed that commissions be allowed for the services of his intestate, as administrator, &c.

"The foregoing, together with the testimony mentioned in the decree, is in substance all the material testimony in the cause; and the said F. A. Bates excepts to the decree of the court."

The final decree of the court, and its rulings on the several matters covered by the objections above specified, are now assigned as error.

W. M. BROOKS, and J. H. CHAPMAN, for appellant.

VARY & JOHNSTON, *contra*.

BYRD, J.—The main question presented on this record is, whether the court below erred in refusing to decree in favor of the appellant a balance of over fifteen thousand dollars paid by his intestate on the debts of Robert H. Jones, deceased. And this may be solved by the discussion and decision of two other questions: 1st, was the payment of the debts of Robert H. Jones, deceased, by appellant's intestate, under the facts and the law, a gift to the distributees of the estate of said Robert H.; or, 2d, was such payment a valid waiver of the right of appellant's intestate to be subrogated to the rights of the respective creditors, or to claim a credit for the amount paid them on a settlement of the estate?

1. All the authorities are harmonious in holding, that delivery is essential to the validity and consummation of a

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parol gift of a chattel or *chose in action*. But some hold, that an *actual delivery* is necessary, and others that the delivery may be *actual* or *constructive*. Chancellor Kent says : "It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part, not only with the possession, but with the dominion of the property." This, perhaps, may be as clear an exposition of the essential elements of the rule, as could well be expressed in so few words. That rule, in its condensed form, may be thus stated, "*delivery is essential to perfect a parol gift of a chattel*"; and may be said, in this form, to be *universal*. It has often been found difficult of application, and adjudications have been made which are conflicting and irreconcilable. These we shall not attempt to review, but will follow what we conceive to be the current of authority and the decisions of this court. There is an apparent conflict between some of the cases decided by this court, as to the terms of the rule and its application, which we will proceed to notice briefly.

In the case of *Sims v. Sims' Adm'r*, (8 Porter, 449,) the court held, that delivery of possession is an essential ingredient in a gift of personal property, but that a change of *possession* is not indispensable; and the court was cautious to say, that it was not called upon to determine "what facts or circumstances would, in law, amount to a delivery of personal property, so as to consummate a gift." There is no difficulty in stating facts which would constitute a valid gift of personal property; but no one, perhaps, can lay down any general or universal rule on the subject, which can solve without a doubt or difficulty every case that may arise in the current of human affairs.

The case of *Sims v. Sims' Adm'r* came before this court again, (2 Ala. Rep. 117,) and Chief-Justice COLLIER, in announcing the opinion of the court, changes the phraseology used in the former opinion, and says, "that it is essential to a parol gift of a chattel that there should be an *actual* delivery of the thing"; and ORMOND, J., who delivered the

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opinion in 8 Porter, 449, adheres thereto, and dissents from the opinion of Chief-Justice COLLIER. GOLDTHWAITE, J. neither assents to, or dissents from, the opinions of the other judges, but puts his decision of the case upon the ground, "that the dominion of the father was never divested"; but it is to be observed, that, in his opinion, he uses the word "delivery," and not the terms "actual delivery",—in this respect following ORMOND, J. The dissenting opinion of the latter is a very lucid and satisfactory exposition of the law; as is also that of Handy, J., in the case of *McWillie v. Van Vacter and Wife*, 35 Miss. R. (6 Geo.) 450.

In the case of *Durett v. Seawell*, (2 Ala. R. 669,) COLLIER, C. J., again uses the terms "actually delivered" in the same connection. In the case of *Pope v. Randolph*, (13 Ala. 221,) DARGAN, J., in the opinion of the court, uses this language: "If the donor parts with the possession of the chattel itself, for the purposes of the gift, it is sufficient; for this is the only delivery that can be made of the subject of the gift." This was said in reference to a gift of the hire or use of slaves. It is also said that, "to divest the title of the donor, he must deliver possession of the chattel to the donee, or some one for the donee"; thus, in language and spirit, following the opinions of ORMOND, J., *supra*.

In the case of *Jones, adm'r, v. Dyer and Wife*, (16 Ala. 224,) COLLIER, C. J., says, in delivering the opinion of the court, "that it is indispensable to a parol gift of a chattel that there should be an *actual* delivery of the thing," following his former opinions; but he impliedly qualifies the rule thus broadly laid down, by saying, "To constitute an effectual delivery, the donor must part with the dominion of the thing, in favor of the donee."

In the case of *Stallings v. Finch*, (25 Ala. 522,) GOLDTHWAITE, J., in delivering the opinion of the court, says: "It is indispensable to the validity of a parol gift of a chattel, that the owner should part with his dominion over it."

In the case of *Gillespie's Adm'r v. Burleson*, (28 Ala. 551,) WALKER, J., in announcing the opinion of the court, says: "While delivery is a necessary constituent of a parol gift,

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it is not indispensable that it should be simultaneous with the words of conveyance."

The word *delivery* is more comprehensive than the terms "actual delivery." A delivery may be actual, or it may be constructive, or symbolical; and we see no reason why the constructive delivery of a chattel or *chose in action*, accompanied with appropriate words of conveyance by way of a gift, would not be effectual to pass the title to the donee, where the donor parts with his dominion over the thing thus delivered.

In the case of *Carradine v. Collins*, (7 S. & M. 428,) that learned jurist, Chief-Justice Sharkey, in delivering the opinion of the court, says: "As between donor and donee, the gift of a chattel is incomplete without delivery, or some act equivalent to delivery, if at the time the thing be susceptible of transmission. We do not say that actual delivery is necessary; it may be constructive, or symbolical; * * * delivery, actual or constructive, is necessary."—10 John. R. 294; 1 N. & McC. 224, 592; 4 B. Mon. 535.

After a careful consideration of the many cases decided, and authors who have written upon this subject, we conceive that the true rule may be thus stated: *delivery, actual or constructive, is essential to the validity or consummation of a parol gift of a chattel; and where the delivery is constructive, it must clearly appear that the donor has parted with his dominion over the thing, in order to pass the title to the donee and effectuate the gift.*

The two leading adjudications brought to our attention by counsel, as applicable to the facts of this case, as to the mode or nature of the delivery of personal property essential to the consummation of a parol gift, are to be found in 10 John. R. 294, and 4 B. Mon. 535.

In the former case it appears, that a father bought a lottery-ticket, and wrote the name of his daughter on it, and afterward it drew a prize of five thousand dollars, which was paid to the father; soon after the prize was drawn, he said "that the ticket did not belong to him—that he had given it to his daughter"; and this he said at various times. At one time it was said in the family, that the daughter ought to divide with the other children, and the

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father replied, "No, she should not divide it; the ticket was her own, and the prize-money belongs to her, and she shall have the whole of it, and I will put it in trade for her." The daughter was about eight years old when the prize was drawn, and lived with her father until she was married. In 1806, the mother reminded the father of the prize-money, and requested him to take care of it; and he replied, "You know the ticket was Eliza's; the money is hers, and I have kept it in trade for her to a good profit; I will never take a shilling of it, or of the profit: she shall have it all." The father frequently had said, before and after she was of age, in her presence, that he had given the ticket to her, and endorsed her name on it, and that the money belonged to her. It did not appear that she ever had the actual possession of the ticket or the money. Upon this state of facts, the court say: "There can be no doubt that delivery of possession is necessary to constitute a valid gift"; and further, after stating the main facts in evidence as above substantially given, the court say, "They afforded reasonable ground for a jury to infer that all the formality necessary to make a valid gift had been complied with, and the right and title of the plaintiff to the money complete and vested." The record in that case expressly negatives the idea of an actual delivery of the ticket; therefore, the delivery spoken of by the court must have been a constructive one, which was thereby recognized as sufficient to pass the possession or title to the daughter.

In the latter case, a father was surety on a note for two of his natural sons. He repeatedly expressed much solicitude for their welfare, and his *intention* to "*give them a start*"—to assist them in their pecuniary affairs. The father afterward voluntarily paid the note; he was not even requested to pay the same by the creditor. He had an ample estate, and had a wife by whom he had several children; but said that his natural children *felt as near to him* as his legitimate ones; that he intended to die without a will, and on that account intended to help them during his life, as they would receive no portion of his estate after his death. Shortly after the payment of the note, he spoke of it as a gift to them, and said he intended to give them five

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hundred dollars more; and he expressed a wish to see them, that he might give them the note, for fear, in the event of his death, they never would get it. They resided about seventy miles from him at the time, and never saw him after he paid the note. It was also in proof that, a considerable time prior to the payment of the note, he said he had given them all he intended to give them; and at his death the note was found among his other notes. Such were the material facts. The court, in passing an opinion upon them, say, "In this case, it is urged there was no delivery; but, in order to determine what delivery was requisite, it may be inquired in what the gift consisted. The payment of the money in discharge of the note, we think, constituted the gift. The act was complete when the money was paid, if paid, as we have assumed, as a gift. * * The donor had parted with the possession of *the thing*, and with all control and dominion over it; he could not recall the money paid, nor change the nature of the act. To render the gift perfect, it was not necessary to deliver the note to the donees. When paid, the note was *functus officio*. * * It was not the note, or the delivery, that constituted the gift, but its payment." And the court upheld the validity of the gift.

If these cases are to be taken and held as a proper application of the general rule on the subject of the delivery *essential* to the consummation of a parol gift of a chattel or a *chose in action*, they appear to us as persuasive, if not conclusive, to show the correctness of the decree of the probate court on this question, looking to all the facts contained in this record. Appellant's intestate, from the evidence, obviously intended to give the money he paid on the debts of his intestate, and not the debts themselves, or the evidence of them; and the declarations of Doctor Jones, as proved by the witnesses McKellar, Woolley, Charles O. Jones, and Doctor Blevins, show that the money was to be paid for the benefit of, and as a gift to the widow and children of Robert H. Jones, deceased; and certainly *was so paid*, if the declarations of Doctor Jones, on his death-bed, to his sister-in-law, referred to the facts proved by the witnesses, and were uttered in good faith, and in a sound con-

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dition of mind; which we think is the proper version of this transaction. If not, what other sensible construction can be given to the evidence and those declarations?

2. But, however this may be, we will proceed to the consideration of the second branch of this main issue. The payment of a debt of any kind, by a party primarily bound to pay, or if a person not so bound voluntarily makes payment, is an extinguishment thereof.—*Wallace v. Br. Bank at Mobile*, 1 Ala. 565; *Kenan v. Holloway*, 16 Ala. 53; *Ross' Adm'r v. Pearson*, 21 Ala. 473; *Wray v. Cox*, 24 Ala. 337. If an administrator, who has assets sufficient of the intestate to pay debts, or who has not, voluntarily pays them out of his own funds, it is an extinguishment of them.—*Prater's Adm'r v. Stinson*, 26 Ala. 456. But, in such a case, he will be entitled to a credit for the amount paid, if the estate is solvent, on a settlement in the appropriate court; or, if it be insolvent, he will be entitled to an allowance for money so paid, if the claim be filed and proved as required by law, and to receive thereupon a *pro-rata* share, with other creditors, of the assets of the estate.—*Hearin v. Savage*, 16 Ala. 286; *McNeill's Adm'r v. McNeill's Creditors*, 36 Ala. 109.

It is repugnant to the policy of the law to permit a trustee to pay or buy a debt which is payable out of the trust funds in his possession, and to hold as an assignee, with the right to assign it to another. Such a transaction would not only be violative of sound policy and principle, but would be subversive of the divine invocation, "lead us not into temptation." After payment by the trustee, the original debt must be treated as *functus officio*, unless for the purposes above indicated; and if any action is maintainable, at law or in equity, it must be for the money so paid, and not on the original debt.

The reason of the rule is apparent, and it should be strictly enforced for the protection of the rights of all persons interested in the trust funds; and especially where minors alone may be interested, who are incapable of having such transactions investigated while recent and susceptible of exposure. When, therefore, the administrator paid the debts of the intestate, they became, *ipso facto*, extin-

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guished ; and if they had been transferred to the widow and children, the transfer would have conferred no right of action on them, at least on the original debts. Whether the right to have money so paid refunded out of the assets of the estate, could be transferred by the administrator, so as to authorize the transferee to claim a decree for it on a settlement of the estate in the probate court, or to file a bill in equity to enforce the assignment and the payment of the money, we will not decide, as the question is not presented by the record.

But a trustee, who pays off a debt chargeable upon the trust funds, out of his own means, may, for a sufficient consideration, waive his right to be subrogated to the *status* of the creditor, or to claim it as a credit on a settlement of the trust. In our opinion, it is clear from the proof that Dr. Jones did not give, or intend to give, the original debts paid by him, or, in other words, the evidence of those debts, to the widow and children of his intestate. But it is equally clear that Dr. Jones, for the love and affection he had for his brother's widow and children, waived his right to claim the money paid on said debts, and the evidence of said debts, as credits against the estate on a settlement thereof ; and it is very perceptible how this would (as he frequently said) be "for the benefit of the widow and children." He, at least, placed himself in the situation of one who voluntarily pays the debt of another for the benefit of the debtor. It is true that the widow and children were not the debtors ; but they were the persons who were the ultimate owners of the fund or property upon which the debts were chargeable, and the persons to be benefited by such payment ; and the affection he bore them was the evident and manifest consideration for the waiver.

The facts satisfy us that he intended, and that he executed his intention, to pay the debts of his intestate in Confederate treasury-notes, for the benefit of the persons who alone could be benefited thereby ; and that he intended to, and did, waive his right to be substituted to the rights of the creditors, or to claim the payment of the debts so paid as credits on a settlement of his administration of the estate.

The reasonable interpretation of what Dr. Jones said on his death-bed is, that he was alluding to declarations he had made to his sister-in-law, similar to those he so uniformly had made to the witnesses and to his mother, as proved by them; and it would be doing injustice to the memory and character of the deceased, who seems to have been endowed with a generous and elevated disposition, to suppose that all he said were mere idle and loose declarations, and were only deceptive and delusive. In that last conversation with his sister-in-law, he evidently referred to the fact that he had paid the debts of the estate, so far as he had paid them, in Confederate money, and conveyed the idea that he had done so for the benefit of herself and children, and not to speculate on them; which would nevertheless be the result, if those debts were allowed as credits on the settlement of his administration, and would make him do what he never intended. And it may be due to the memory of Dr. Jones to say, that we see no evidence tending in the least to reflect on his character; but, on the contrary, his conduct and bearing, as shown by the record, distinguish him as a man of the highest integrity and the noblest sentiments.

4. The bill of exchange drawn by Robert H. Jones on John H. Jones, payable to Wyatt, and paid by John H. on the 22d July, 1864, was paid in the life-time of Robert H.; and John H. having been appointed his administrator in chief, it should, perhaps, more clearly appear than it does by the record, that John H. was the holder of the bill at the death of his intestate; for, *non constat*, he may have obtained it from the papers of his intestate, and both have died without cancelling it. But, admitting that Robert H. never paid John H. the amount the latter paid Wyatt, still it appears by the account-current that John H., on the 1st July, 1864, received on a due-bill of J. H. Jones two thousand nine hundred and fifty-eight 70-100 dollars, and on the 1st October, 1864, he received the sum of six thousand three hundred and sixty-six 05-100 dollars, which sums were more than sufficient to re-imburse the amount he paid on said bill, and all other debts paid by him on account of said estate in that year; and under the facts we hold that

he so applied said funds as to discharge the amount so paid by him on said bill, as had a right to do, the estate being then solvent, as appears by the proof.

As to the debts formerly due to Mrs. Rachel Jones from Robert H. Jones, and which constitute a large part of the balance claimed by the appellant as administrator of John H. Jones deceased, as shown in the record, we have this to say, if those debts were never in fact, or in consideration of law, paid by John H. Jones to Mrs. Jones, then they should not have been allowed as credits on the settlement; and if they were so paid by him, we are satisfied that they were paid in Confederate money, and therefore come within the influence of the principles applicable to other debts so paid, as hereinbefore announced. The evidence satisfies us that they were so paid by Dr. Jones, and that he or his estate is responsible to Mrs. Jones. Her evidence seems to us conclusive on this point.

In every view, therefore, we take of the main question in this cause, we are of opinion that the court below did not commit any error of which appellant can complain.

4. Appellant's intestate having paid all the debts set forth in the account, in exoneration of the estate, and for the benefit of the distributees, except, perhaps, the bill of exchange paid Wyatt; and the account and record showing funds more than sufficient to pay any compensation and commissions to which appellant's intestate is entitled, and for *which funds* no decree has been rendered against appellant as administrator of John H. Jones, deceased, this court will not reverse the decree of the court below, because no commissions were allowed. At most, it is error without injury. John H. Jones received about fifteen thousand dollars in money, as appears by the account, more than the amount of the bill of exchange which he paid Wyatt, and surely this sum will more than cover his commissions and attorney's fees.

5. There can be no doubt about the right of trustees to employ counsel to advise and assist them in performance of the duties imposed by law and the trust. But such advice and assistance must be necessary to the protection of the trust estate, or for the benefit of the *cestuis que trust*;

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or to protect the trustee against the unjust or wrongful claims or demands of the beneficiaries or others. A trustee is not entitled to a credit, on a settlement, for such services, or the value of them, unless he shows payment. 2 Williams' Exrs. 1581, and note 1; *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

In the case of *Pinckard's Distributees v. Pinckard's Adm'r*, (24 Ala. 250,) it appears, at least inferentially, that the fees of counsel claimed as a credit were not paid, and the court allowed the credit; and the case of *Bendall's Distributees v. Bendall's Adm'r*, *supra*, is the only authority cited to sustain the allowance. But, in the latter case, it appears from the record that the fees had been paid by the administrator; and it is therefore no authority to support an allowance for counsel fees which have not been paid. It is an authority in point to show that an administrator is entitled to counsel for his own protection in the rightful discharge of the duties of his trust, and that the trust fund is chargeable with fair and reasonable fees when paid by him.

When an administrator who is an attorney, performs professional services for the estate, not within the scope of his duties as administrator, and which were necessary and proper, he may very properly call upon the court to make an allowance for such services, as he is not allowed to contract with himself, and cannot properly receipt to himself. This is an exception to the general rule above stated.

To allow an administrator a credit for professional or other services rendered by others for the estate, or himself as its representative, without having paid the person rendering them, or, at least, obtained a receipt therefor, would be opening a door to fraud and imposition, which the law is studious and careful in keeping closed to every temptation or opportunity to make any profit out of the trust for himself or others. If the law were otherwise, an administrator might obtain a credit for the value of services rendered the estate by others, and never pay the parties entitled; or if any thing, such portion as he might see proper to pay, or as he had contracted to pay before the credit was actually allowed, thereby giving him the advantage of any excess

that might be allowed over the sum contracted to be paid. Appellant had the right to employ counsel ; but he was not entitled to an allowance for any part of the fee, without payment of the same ; and the court did not, therefore, err in its ruling on this question.—See *Taylor et ux. v. Kilgore*, 33 Ala. 214 ; *Pearson v. Darrington*, 32 Ala. 227.

Having disposed of the assignments of error argued by counsel, it only remains for us to say, that there is no error in the record of which appellant can complain, and the decree of the probate court is affirmed.

GENTRY vs. ROGERS.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LANDS.]

1. *Specific performance, as matter of discretion.*—Under bills for the specific performance of contracts, the chancery court exercises a discretionary power of granting or refusing its aid, not arbitrarily or capriciously, but upon a sound and temperate consideration of the facts of each particular case, as tested by existing rules ; and if, under all the circumstances of the case, a specific performance would be inequitable, relief will not be granted.
2. *Same, as affected by offer to perform by plaintiff.*—If the vendor refuses to deliver the possession of the land on the demand of the purchaser, and refuses to accept payment of the first installment of the purchase-money when due and tendered, and declares that he will not comply with the terms of the contract, the purchaser may immediately sue at law for a breach of the contract, or seek relief in equity ; but, if he fails to seek any legal redress until after the day stipulated for the payment of the residue of the purchase-money, the former repudiation of the contract by the vendor does not excuse him from showing an offer on his part, on the specified day, to perform all the stipulations of the contract.
3. *Same, as affected by laches.*—The purchaser in this case having been distinctly notified by the vendor, two years before the day fixed for the payment of the purchase-money, that he repudiated the contract, and having delayed to file his bill for a specific performance for about nine months after that day, and having shown no excuse for his delay,—the laches was held sufficient, in connection with his failure to

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show a valid excuse for his omission to tender performance in full on the specified day, to deprive him of the right to relief.

4. *Decree reversed and rendered.*—The chancellor's decree in this case, granting a specific performance on the allegations of the bill and a decree *pro confesso*, having been reversed on account of the complainant's failure to show that he had done all the law required on his part to entitle him to such decree, the appellate court refused to remand the cause, and rendered a decree dismissing the bill.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 17th September, 1863, by Anthony F. Rogers, against Daniel H. Gentry, and sought the specific performance of a contract for the sale of a tract of land. The chancellor's decree in favor of the complainant, with other matters which require no particular notice, is now assigned as error.

WADDELL & MCCOY, for appellant.

RICE & SEMPLE, with whom was GEO. D. HOOPER, *contra*.

JUDGE, J.—On the 29th of December, 1859, appellant sold to appellee a tract of land, for which the sum of thirty-two hundred dollars was to be paid; one thousand dollars on the 29th of December, 1860, and twenty-two hundred dollars on the 29th of December, 1862. Notes for the purchase-money were executed and delivered to the vendor, and a bond, conditioned to make a title to the land "upon the payment of the notes," was executed and delivered to the vendee.

The complainant in the court below, the vendee, filed his bill for a specific performance of the contract. The defendant failed to answer within the time prescribed, and a decree *pro confesso* was rendered against him, which he afterwards struggled, without success, to have set aside. The register, under an order of reference, stated an account between the parties, in which the vendee was charged with the purchase-money, and interest thereon, amounting in the aggregate to \$4,231.13; and the vendor was charged with the rents and profits, and interest thereon, from the date of the sale to the time of taking the account, and with the

further sum of \$2,000, as net profits from the sale of timber cut on the premises, all amounting in the aggregate to \$4,797.94. This left a balance due the complainant of \$566.81. The report of the register was confirmed, and the chancellor decreed a specific performance, and that the balance ascertained to be due the complainant should be paid.

Before the order of reference was made, the defendant filed his written notice, that if any decree should be rendered in his favor for the purchase-money, or any part thereof, he would be unwilling to receive anything in payment but gold and silver; and, in consequence of this notice, the chancellor, in the order of reference, directed the register to ascertain "the annual value in specie, or its equivalent, of the rents and profits of the land", &c. But for the ascertainment of the value of the rents and profits on the basis of their value *in specie*, it is fair to presume a larger balance would have been found against the vendor. But as it is, the decree accomplishes the following result: In something more than six years, during four of which the late war was in progress, the rents and profits of the land, and proceeds of timber sold, estimated on a specie basis, pay the entire purchase-money, and five hundred and sixty-six dollars over, which the vendee recovers, together with the land, from the vendor. It is contended that such a result, under all the circumstances of the case, is inequitable; and that for this reason specific performance of the agreement between the parties should not be enforced.

It is true that, on a bill for specific performance, a court of equity reserves to itself a discretion of giving or refusing its aid, not arbitrarily or capriciously, but upon a sound and temperate consideration of the merits of each particular case, exercising its discretion in a judicial manner, according to existing rules.—*Gould v. Womack*, 2 Ala. 83; *Blackwilder v. Loveless*, 21 Ala. 371. And if, under all the circumstances of the case, it would be inequitable to enforce a performance, relief will not be granted, but the parties left to their legal remedy.—*Ellis v. Burden*, 1 Ala. 458; *Casey v. Holmes et al.*, 10 Ala. 776; *Blackwilder v. Loveless*, *supra*; 2 Story's Equity Jur. § 750. There would be much

greater force in the objection that the decree in the case before us was inequitable, for the reason stated, if the *legitimate* rents and profits of the premises had accomplished the result arrived at. Instead of this, however, two thousand dollars of the aggregate charged against the vendor was for *waste* committed by him, which, it is averred in the bill, was for his own profit, and to the detriment of the estate. We waive a more particular inquiry into the circumstances of the case, to ascertain if the decree, for the single reason above stated, was inequitable; preferring to rest our decision upon other grounds, which we will now proceed to consider.

2. By the agreement, the payment of the purchase-money in full by one party, and the execution of the stipulated conveyance by the other, were mutual and concurrent conditions, to be contemporaneously performed; and each of the contractors was bound to perform on his part at the time fixed.—*Ledyard v. Manning*, 1 Ala. 153; *McKleroy v. Tulane*, 34 Ala. 78. The vendee, however, never having been in possession under the contract, but the vendor having retained the possession, and had the use and enjoyment of the lands from the date of the contract, when the time arrived for the payment of the purchase-money in full, the vendee was entitled to an account of the rents and profits, and to have his notes for the purchase-money credited therewith.—*Davis v. Lassiter*, 20 Ala. 561. The demand for such an accounting, and an offer, coupled with the ability, to pay any balance that might be found against him on the account, being stated, and the tender of a deed to be executed by the vendor conveying the title, were acts, the performance of which by the vendee was required by the contract, to make the obligation of the vendor perfect.—*Wade v. Killough et al.*, 5 Stew. & Por. 450; *Johnson and Wife v. Collins*, 17 Ala. 318. It is contended that a compliance with these conditions on the part of the vendee was rendered unnecessary, not by the entire absence of a capacity on the part of the vendor to give a good title, (*Johnson and Wife v. Collins, supra*,) nor by his having been prevented from their performance by the vendor, (*Bass & Carter v. Gilliland*, 5 Ala. 761,) but by the acts of the

vendor in violation of the contract, *before the time had arrived for their performance.*

We must look to the allegations of the bill for the ascertainment of the acts of the defendant, thus relied on, inasmuch as the allegations relating to these acts, under the decree *pro confesso*, constitute the only evidence bearing upon this question. It is averred in the bill, that "soon after the purchase, complainant demanded possession of the land, which defendant had agreed to give him, but defendant refused to give it to him;" "that the defendant continually evaded a compliance, until the 25th December, 1860, when complainant tendered him payment of the first thousand dollars due, in gold; but that the defendant absolutely refused, and repudiated the contract, declaring he never would comply with it;" "that he is entitled to have his notes for the purchase-money credited by the proceeds of the sale of the timber and other trees, and the value of the wood sold and carried off, and also by the value of the rents and profits of the cleared land, and the houses and improvements, and if there be any excess after paying the notes, that he should have a decree for such excess;" complainant "offering to do and perform, however, whatever the court may direct, and to pay whatever the court may decide to be right." It is further averred, "that ever since the day of sale, complainant has been ready and willing to comply with the terms and conditions on his part," and "that nothing but the refusal of the defendant to comply with the contract on his part prevents a renewal of attempts to obtain title without suit, but after repeated and decided refusals he has deemed it unnecessary to do any thing further."

The facts upon which a decree is based, upon an implied confession, should be distinctly alleged; and no intendment of a fact, not within the allegations, can be made, to support such a decree.—*White v. Lewis*, 2 A. K. Marsh. 123. And on a bill for specific performance, allegations of a general character, as to performance by one party, or non-performance by the other, are insufficient. Facts should be distinctly stated, not mere conclusions, that the court may judge if each has done all that he ought.—*Davis v. Harri-*

son, 4 Litt. 261; *McKleroy v. Tulane*, 34 Ala. 79. The distinct acts charged against the defendant, in repudiation of the contract, are—1st, that demand having been made for the possession of the land, “soon after the purchase,” the defendant refused to give it; 2d, that ever since the date of the purchase, defendant has continuously occupied the premises, using them as his own; 3d, that the first installment of the purchase-money having been tendered on the day it was due, the defendant refused to receive it, and repudiated the contract, declaring he never would comply with it. These transactions, except the continuous possession of the defendant, occurred *two years before the time fixed by the contract for its complete performance*.

It is true the equitable estate vested in the purchaser, under such a contract as the one we are considering, is attended by most, if not all, the incidents of ownership; and that it confers upon the purchaser the right of entry and enjoyment, until such time as he may make default in the payment of the purchase-money, or any part thereof. If such default be made, the vendor may assert any one of the remedies afforded a mortgagee, as a means of realizing his debt; the legal title being held by the vendor, as a security for the payment of the purchase-money, and a court of equity considering the contract in the nature of a conveyance to the purchaser, and a re-conveyance back by way of mortgage.—*Reid v. Davis*, 4 Ala. 83; *Roper v. McCook & Robinson*, 7 Ala. 318; *Springle's Heirs v. Shields & Paulling*, 17 Ala. 295; *Johnson and Wife v. Collins*, 17 Ala. 318; *Haley et al. v. Bennett*, 5 Porter, 452; *Chapman v. Chunn et al.*, 5 Ala. 397; *Chapman v. Glassel*, 13 Ala. 50; *Conner et al. v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 371; *Ross v. Ross*, 21 Ala. 322; *Davis v. Lassiter*, 20 Ala. 561; *Seabury v. Stewart & Easton*, 22 Ala. 207.

But, such being the law, the refusal of the defendant to give the complainant possession, when entitled to it under the contract, did not leave the complainant without remedy. He might have sued at law for a breach of the contract, or filed his bill for such equitable relief as the circumstances would justify.—*Johnson and Wife v. Collins*, *supra*. The failure to seek any redress was seeming acquiescence in

the repudiation of the contract by the defendant. But, if he did not intend such acquiescence, when, after the lapse of two years, the time arrived for the performance of the mutual conditions necessary to a complete execution of the contract, he should have been prompt to perform those conditions required of him. For, it is a rule in equity, that the party seeking performance must show that he has not been in fault, but has taken all proper steps towards performance on his own part, and has been ready, prompt, and eager, to perform those acts which constituted the consideration of the alleged promise on the part of the defendant.—*Colson v. Thompson*, 2 Wheaton, 336; *Rogers v. Saunders*, 16 Maine, 92; *Brown v. Haines*, 12 Ohio, 1; *Bates v. Wheeler*, 2 Scam. 54. And, although a party may have disregarded the terms of his contract, the other party must show reasonable diligence to entitle himself to a decree of performance. It is not sufficient for him to show that the opposite party is in default, but he must show himself without default.—*Longworth v. Taylor*, 1 McLean, 395; *Doyle v. Teas*, 4 Scam. 202; *McKleroy v. Tulane*, 34 Ala. 78; *Higby v. Whittaker*, 8 Ham. 198. In asking for relief against injustice arising from the bad faith of his adversary, he must not be obnoxious to the same imputation. In suits of this character, as Judge Story has said, “the maxim is emphatically applied, he who seeks equity must do equity.”—2 Story’s Eq. Jur. § 693.

In the case before us, although the vendor had declared, two years before the time had arrived for full performance, that he never would comply with the contract on his part, yet, when that time arrived, *non constat* but he would have reconsidered and made a title, if the vendee had performed the conditions required of him. There may be cases, in which it is sufficient for the complainant, by his bill, to offer to pay whatever sum is admitted or ascertained to be due to the defendant, or to do whatever the court may consider necessary to be done on his part towards making the decree which he seeks just and equitable with regard to the other parties to the suit.—*Martin’s Heirs v. Tennison et al.*, 26 Ala. 738, and authorities there cited. But, as we have seen, in bills for specific performance, a more stringent

rule prevails.—*McKleroy v. Tulane*, 34 Ala. 78, and authorities before cited.

3. But there is another consideration which militates against the case of complainant. If one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them; and the other contracting party, to whom the notice is so given, makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract, and will leave the parties to their remedies and liabilities at law.—2 White & Tudor's Eq. Cases, note to *Seton v. Slade*, part 2, page 16; *Guest v. Pomfrey*, 5 Vesey, 818; *Heapley v. Hill*, 2 Sim. & Stu. 29; *Watson v. Reid*, 1 Russ. & My. 236; *Walker v. Jeffreys*, 1 Hare, 341. Not deciding the question, whether the rule thus laid down had application to the case of complainant before the time fixed for the complete performance of the contract; yet, with distinct and emphatic notice that the defendant would not hold himself bound to perform the contract between them, given two years before the period fixed for performance, he permitted about nine months to elapse from the latter period, before he filed his bill to enforce performance; and this delay on his part is not accounted for, but left wholly unexplained. In *Watson v. Reid*, (1 Russell & Mylne, 236,) the plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance, until about one year afterward; and the bill was dismissed on the sole ground of unreasonable delay in filing it. In such cases, though time be not of the essence of the contract, a court of equity will not allow of a delay which would enable a party to take advantage of the turn of the market, and have the contract performed, *only in case it suits his interest*. The complainant in the case before us, by the delay in filing his bill, and by his failure to perform the acts required of him by the contract, did not evince that promptness and eagerness for a performance required at his hands, to entitle him to invoke the urgent powers of a court of

chancery to compel performance. But we do not hold that the delay in the filing of the bill would, of itself, be sufficient to deprive him of the right to relief.

For the reasons we have given, we feel constrained to hold, that the chancellor should not have decreed a specific performance in this case. "Considerable caution should be used in decreeing specific performance of agreements, to see that it really does complete justice between the parties";—(*King v. Morford*, Saxton's N. J. Ch. Rep. 274;)—and the extraordinary powers of a court of chancery "ought never to be applied, *in the exercise of any discretionary jurisdiction*, when doubts prevail as to the perfect soundness of the plaintiff's claim, or apparent justice characterizes the defendant's objections."—*Dalzell v. Crawford*, Parsons' Select Equity Cases, 37. The refusal of a court of equity to decree specific performance, does not absolutely repudiate the complainant's rights, if any he can establish. It only denies to him an extraordinary remedy, properly applicable only to cases in no respect equivocal, leaving him to a court of law for any redress to which he may be entitled. 2 Story's Equity Jur. § 769.

The disposition we make of this case renders it unnecessary to consider any of the other questions presented by the record, and argued by counsel.

Let the decree of the chancellor be reversed, and a decree be here rendered dismissing the bill, without prejudice to complainant's remedy at law. Appellee must pay the costs of this court, and of the court below.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application for a modification of the decree, by the appellee's counsel, the following opinion was delivered:

JUDGE, J.—We are asked to modify the decree rendered in this cause on a previous day of the present term, by reversing and remanding the cause, instead of dismissing the bill. We cannot, as was said in *Williams v. Barnes*, (28 Ala. 613,) "consistently with the decisions of this court, and a wholesome justice, remand the case. The settled

practice of this court is, to render the decree which the chancery court ought to have rendered, where the amendment would have the effect of making a different case." The reasoning and conclusion attained upon this question, in the case cited above, fully sustained as it is by the authorities therein referred to, constrain us to refuse the application.

WATSON AND WIFE *vs.* STONE.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Bill of exceptions; when necessary in probate case.*—Under section 1891 of the Code, as amended by the act approved December 12, 1857, (Session Acts, 1857-8, p. 244,) a bill of exceptions is not necessary to enable the appellate court to revise a decree of the probate court, rendered on final settlement of a guardian's accounts, when the error complained of appears on the face of the decree.
2. *Investment by guardian in Confederate bonds, and receipt of Confederate currency in payment of debts.*—Under the principles of law which are now binding on the judicial tribunals of this State, a guardian who, acting in good faith, under the authority conferred by the act of the legislature approved November 9, 1861, (Session Acts, 1861, p. 53,) received Confederate States treasury-notes in payment of debts due to his ward, and invested his ward's funds in Confederate States bonds, is entitled to credits, on final settlement of his accounts, for the amount of such investments, and for the amount of such funds remaining in his hands at the close of the war.
3. *Status of State government during war.*—The existence of this State, as a member of the Federal Union, was not destroyed by the ordinance of secession, nor by its hostile attitude towards the United States during the war: it existed as a government *de facto*, and possessed the powers which pertain to such a government.
4. *Rights of government de facto.*—The legislative acts of a government *de facto*, and acts done under their authority during its existence, are valid, and will be sustained by the courts after the overthrow of such government, notwithstanding their repugnancy to the laws of the rightful government by which it is overthrown.

APPEAL from the Probate Court of Lowndes.

IN the matter of the final settlement of the accounts and vouchers of Warren T. Stone as guardian of Susan A. V. Merriwether, a minor, now the wife of A. B. Watson. The letters of guardianship were granted by said probate court on the 13th February, 1857. The guardian filed his accounts and vouchers for a settlement on the 30th September, 1865; and the final settlement was made on the 25th November, 1865. The appeal is prosecuted by Watson and wife, who assign as error the allowance of credits to the guardian for moneys invested by him in Confederate States bonds, and for the amount of treasury-notes of the Confederate States which he had taken in payment of debts due to his ward, and which remained in his hands at the time of the settlement.

RICE, SEMPLE & GOLDTHWAITE, for appellants.—Every argument sustaining the validity of the receipt of Confederate treasury-notes and bonds by trustees, in Alabama, is radically defective and unsound, in this, that it amounts to a practical denial of the *supremacy* of the constitution and laws of the United States, in the Confederate States, during the war, or during a part of the period covered by the war. Beyond doubt, this *supremacy* is overthrown and displaced by the conquest and military occupation of a *foreign nation at war with the United States*, in that portion of territory so conquered and occupied. That is the point decided in *The United States v. Rice*, 4 Wheaton, 246. But no such effect can be produced by the act of any *belligerent*, unless that belligerent not only is in a state of war with the United States, but is also *foreign* to the United States, or *recognized* by the United States as a *State or nation*, or *belligerent de jure*, and as possessing all the capacities and powers and sovereignty of a *government*. For example: No such effect can be produced by any number of people of Great Britain, however great or however successful in their hostile capture and occupation of portions of the territory of the United States, unless their hostile operations occur in a war against the United States, recognized as such by *Great Britain*, or carried on by the actual concurrence of the war-making power of Great Britain.—*The People v. McLeod*,

1 Hill's (N. Y.) Rep. 377 ; *The Prize Cases*, 2 Black's U. S. S. C. Rep. In other words, the displacement and overthrow of the laws and sovereignty of the United States, over a part of its territory, by military conquest and occupation of persons engaged in hostilities, can never occur, except in *that kind of public war* to constitute which "at least two nations, in their corporate capacities, are essential parties." And no court can treat such war as in existence, "until the national power (the war-making power) of the country where the court sits, officially declares" or recognizes the existence of such war.—*The People v. McLeod*, (*supra.*)

Is it credible that the supreme court of the United States will decide, that the laws and sovereignty of the United States were even temporarily displaced and overthrown in the several portions of territory in *Maryland* and *Pennsylvania*, captured and occupied by General Lee during the war? Does the principle upon which *The United States v. Rice*, (*supra.*) was decided, apply to captures and occupation, by the Confederate army, of places within the territory of the non-seceding States? Is there any authority for asserting that it does?

Before the secession of the States known as the Confederate States, it was universally admitted, that no State could overthrow, or suspend, *the supremacy* of the constitution and laws of the United States, within its limits, *without secession and war*, or one of them ; and it is universally admitted now, that *that supremacy* has never been destroyed, or suspended, in any State belonging to the Union before the war, unless that result was effected by secession and the late war, or one of them. The inquiry, then, comes to this : Did secession and the late war, or either of them, overthrow, or suspend, even for an instant, within any seceding State, *the supremacy* of the constitution and laws of the United States? Secession and the late war were but an attempt on the part of the people of a minority of the States of the Union, to overthrow, within their limits, the constitution and laws and government of the United States, and to establish for themselves *a new government* ; in other words, *a new State*, *a new political corporation*, the corporate name of which was, "The Confederate States of

America." This attempt acquired the proportions, dignity and character of a civil war, *but failed*; and failed *without any recognition* of this "*new State*" on the part of the government of the United States, or the government of any other nation.

The law applicable to this state of facts has been firmly settled by the supreme court of the United States, for nearly half a century. It is thus stated by that court: "No doctrine is better established, than that it belongs *exclusively* to governments to recognize *new states* in the revolutions which may occur in the world; and *until such recognition*, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court, in the case of *Rose v. Himely*, (4 Cranch, 241,) and to that decision, on this point, we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals." This doctrine was re-affirmed and applied, in *Kennett v. Chambers*, 14 How. Rep. 38.

The application of this settled doctrine inevitably commands the conclusion, at least from the courts, that neither secession nor the war, nor both together, worked any *alteration* as to the *supremacy* of the constitution and laws of the United States, in any of the seceding States, during any period of the late war; and that, on the contrary, the *supremacy* of the constitution and laws of the United States, which was part and parcel of "the ancient state of things", (the state of things *before* the war,) remained and continued "*unaltered*", during every moment of the war, in every seceding State.

It is manifestly impossible to reconcile the validity or use of Confederate treasury-notes or bonds, in any of the seceding States, with the *continuity and unchanging supremacy* of the constitution and laws of the United States. The issue of those notes and bonds was unquestionably means devised and employed by the *new State*, known as "The Confederate States of America", to establish *its own supremacy* in lieu of the supremacy of the constitution and laws and government of the United States, which it proposed

and sought to overthrow within the limits of all the seceding States. The issue and use of such notes or bonds were alike illegal, and opposed to the public policy of the United States, and to the constitution and laws thereof.

The creation itself of "The Confederate States of America" is expressly prohibited by the constitution of the United States.—Art. 1 sec. 10. Hence "the Confederate States of America" could not, within the limits of the United States, as those limits existed at the time of secession, be deemed, or taken, or recognized, by any court in the first instance, as a *political corporation*, having a lawful existence, and possessing governmental or sovereign powers, although it may have been "a belligerent *de facto*", and may have been recognized and treated as a belligerent *de facto* by the United States. The recognition of the United States government did not go beyond the recognition of the Confederate States of America as a belligerent *de facto*. There was no recognition of the Confederate States as a belligerent *de jure*.—See authorities cited in Dana's 8th edition of Wheaton's Int. Law, (marginal or bottom pages,) 374–377.

Inasmuch as the issue and use of Confederate treasury-notes and bonds were in contravention of the public policy of the United States, and of the constitution and laws thereof, such issue and use are not only void, but incapable of confirmation or healing, by the act of any State convention or legislature.—*Pettit v. Pettit*, 32 Ala. 288, and authorities there cited; *Kennett v. Chambers*, (*supra*.) To permit a State thus to confirm or heal what has been done in contravention of the constitution, laws, and public policy of the United States, is, to that extent, to permit a State to overthrow the supremacy of the constitution and laws of the United States, and to surrender to it that supremacy. Any act of a State, either through its legislature or convention, purporting to authorize the doing of anything in contravention of the supreme law, is null; and "a subsequent statute, ratifying and approving the original authority, could add nothing to the protection proffered by the first. It would be but the junction of two nullities."—*The People v. McLeod*, 1 Hill's (N. Y.) Rep. 424.

The constitution and laws of the United States could not, in any just sense, be deemed "the supreme law of the land", if every State could, by a healing act, impart validity to everything or anything, done under a prior act, in conflict with that supreme law. That supreme law explicitly declares, (Const. U. S. art. 6,) that "the judges in every State shall be bound thereby", (that is, by said supreme law,) "*anything* in the constitution and laws of any State to the contrary notwithstanding." All these judges take an oath to support that supreme law. How can that duty be performed, if the claims and provisions of that supreme law can be excluded from the consideration of the judges, or silenced, or disregarded, on the ground that a State has passed a healing act, or that the parties are "*in pari delicto*", or on any other ground? This supreme law requires the judges to hold as invalid *every act* of an individual, or a State convention, or a State legislature, which is drawn in question before them in a proper judicial proceeding, and which is in contravention of that supreme law. If a healing act which is contrary to the supreme law, is allowed any effect by the courts, to the extent of that effect, the supreme law ceases to be the supreme law. And so, if, upon the pretext of a healing act, or upon any other pretext, the supreme law can be silenced, or not carried into effect, as the controlling and unyielding rule of decision, then this consequence would result, that the supreme law of the land is to be treated by the courts as the supreme law, only in cases where a healing act, or some maxim, or other thing, does not interfere with it. The true position is, that the supreme law yields to nothing, but furnishes the binding rule of decision in every conceivable case, where an act contrary to its provisions is drawn in question in a proper judicial proceeding.—*Ableman v. Booth*, 21 How. 506.

It may be conceded, for the sake of argument, that, but for the said supreme law, each State might authorize trustees to receive for the debts and property of *cestuis que trust* whatever thing or things the State might choose to designate. But that concession is of no avail here. It does not touch the pertinent question, whether a State can, under the pretense of regulating the rights and liabilities of trus-

tees, authorize them to receive a currency, the issue and use of which is contrary to the supreme law. There can be no doubt, that the design of the legislature of Alabama, in enacting that trustees might receive Confederate treasury-notes and bonds, was to maintain and enhance the value of such issues, and thus aid the Confederate States in their attempt to overthrow, within their limits, the said supreme law. Suppose the legislature of New York, during the war, with the unquestionable design of aiding the Confederate States in their said attempt, had enacted that trustees in that State might receive the issues of the Confederate States of America; would any court hold such enactment valid? Why not? Because of its repugnance to the supreme law. But the repugnance in that case would not have been as clear and strong as in the case at bar. For here, the acts drawn in question are the acts of one of the seceding States—one of the States which had entered into a “treaty, alliance and confederation”, with the other seceding States, and, with them, had constituted as the common agent, what they called a government, known as “the Confederate States of America”, and had sanctioned the war then existing between this common agent and the United States, and all the acts then done by this common agent, including the issue of Confederate treasury-notes and bonds. The acts here drawn in question are the acts of such a State, and were passed with the clear design, and for the manifest purpose, of aiding such common agent in the prosecution of the then existing war. The repugnance of such acts to the constitution and laws and public policy of the United States, is manifest.

The force of the foregoing views is not varied or affected by the fact, that the late convention in Alabama was authorized by, and held under, the proclamation or act of the president of the United States, as the commander-in-chief of the army and navy thereof;—1st, because it is certain he did not in any manner profess to authorize, or authorize, that convention to violate “the supreme law of the land”, or to sanction anything which had been done in violation thereof; 2d, because he himself had no right to give to any such convention the power to violate, or to sanction

any violation of, the supreme law; although he did have power to authorize the holding of such convention for lawful and constitutional purposes and ends.—*Campbell v. Hall*, 1 Cowper's Rep. 204.

Nor can the force of these views be impaired, to any extent, by the assertion that the right of the State (such seceded State) to legislate is attributed to the existence of a *de facto* government, which was *not within or under the sovereignty of the United States*—which was in actual derogation of it. For this assertion virtually claims for the legislature of such seceded State, not only an exemption from the universal test, above stated, which is applicable to every law of a foreign State (that is, a State “*not within or under the sovereignty of the United States*”); but it goes further, and claims for each State which has ever been in the Union the right to overthrow the supremacy of the constitution and laws of the United States, within its own limits, by establishing, within its limits, a *de facto* government; and on the conquest and destruction of such *de facto* government, by the United States, and on the admitted return of such State to the Union, to have the legislation of such State during the existence of such *de facto* government, however repugnant to the constitution and laws of the United States, and however much “opposed to the national policy and national institutions” of the United States, held valid by all the courts in the Union, as if there were not any such constitution or laws, or policy, or institutions. Such a claim finds no sanction in adjudged cases, especially when set up in court, for a State, claiming to be a new State, which has separated from the government of which it formed part, and which had never been recognized as a new State, by the proper department of the old government.—*Rose v. Himely*, 4 Cranch, 272; *Gelston v. Hoyt*, 3 Wheaton, 324; *Kennett v. Chambers*, 14 Howard, 38; *Ogden v. Folliott*, 3 Term R. 726; *Dudley v. Folliott*, 3 Term R. 584; Wheaton on International Law, edition edited by R. H. Dana, bottom pages, 374–377, note.

It is denied that there can be a *de facto* State in the Union. But even conceding that there can be such a thing, still it is clear that the constitution and laws of the United

States are "the supreme law" in such State, as it is in every other State in the Union. Every government or State in the Union, no matter by what name called, whether it be called a *de facto* government or State, or a *de jure* government or State, has for its supreme law the constitution and laws of the United States. No State can be in the Union, if this be not its supreme law. As soon as it is established that this is not its supreme law, it is established that the State is out of the Union, and of course a foreign State. Each State is either *in or out* of the Union, at any given time. It cannot, at the same time, be both *in and out* of the Union.

A *de facto* government or State is one which is different from, and in derogation of the old one; it certainly does not consist with "the ancient state of things." Courts which recognize it cannot "consider the ancient state of things as remaining unaltered." It is only by refusing to recognize it, that courts can prove that they do "consider the ancient state of things as remaining unaltered." The question arises, then, can courts take the lead of governments (of the political departments of government), in recognizing this new state of things, different from, and in derogation of "the ancient state of things," or must the courts wait upon and follow the political departments of the government in such matters? All the authorities agree, that the courts must, in such matters, wait upon and follow the political departments; that until the political department recognizes the existence of the new state of things, "courts of justice must consider the ancient state of things as remaining unaltered."—*Rose v. Himely*, 4 Cranch, 272; *Gelston v. Hoyt*, 3 Wheaton, 324; *Kennett v. Chambers*, 14 Howard, 38.

The political department of the government of the United States did not recognize the existence of a *de facto* government in Alabama "which was not within or under the sovereignty of the United States," prior to the adoption of the legislation as to Confederate issues, now under consideration. Nor, indeed, has the political department of the government of the United States, at any time since Alabama was admitted into the Union, recognized Alabama,

or any government in it, as not "within or under the sovereignty of the United States;" but, on the contrary, has uniformly insisted that Alabama, and every thing like government within it, has been continuously, and without any intermission whatever, within and under the sovereignty of the United States. And under this state of facts, courts which recognize now the authority of the constitution and laws of the United States "must consider" Alabama, and every thing like government in it, as having been at all times, since the original admission of Alabama into the Union, "within and under the sovereignty of the United States."—Wheaton's Int. Law, edited by R. H. Dana, bottom pages 374–377, note.

WATTS & TROY, with whom were CLEMENTS & WILLIAMSON, *contra*.—1. The act approved November 9, 1861, expressly authorized the guardian to invest his ward's funds in bonds and treasury-notes of the Confederate States. The investment was reported to the court, as required by the statute, and the credit was allowed on an annual settlement. The acts of the guardian, and the decree of the court sanctioning them, were ratified and confirmed by the ordinance of the State convention, No. 26, adopted on the 28th September, 1865.

2. The acts of the guardian were done in good faith, and were in accordance with the law of the State at the time; and as the Confederate States then had complete control and dominion over Alabama, his acts can not be avoided as contrary to the laws and policy of the United States, who now have control and dominion over the State. The acts of a government *de facto*, and of those persons who are subject to its dominion and control, in accordance with its laws and policy, are valid, notwithstanding the subsequent overthrow of such government *de facto*.—*United States v. Rice*, 4 Wheaton, 91; *Fleming v. Page*, 9 Howard, 603; 3 Phillimore, 479, *et seq.*

3. The Confederate States were a government *de facto*. For four years they had a government, as fully and completely organized as that of the United States, and had exclusive possession and dominion over the people and ter-

ritory of Alabama. They were recognized as a government *de facto* by the United States; by decisions of their courts, and by the acts of their executive and military authorities. The principles settled by the courts of the United States, in reference to the war of 1776, are applicable to the Confederate States; and they are recognized by all works on international law. In the early progress of the war, this principle was recognized by the United States courts in several prize cases, which were published and commented on in the newspapers of the day; but the official reports are not now accessible to us. Phillimore, and other writers on international law, have traced the doctrine from Alexander's conquest of Greece to the conquests of Napoleon Buonaparte; and illustrations of it are furnished in the history of the civil wars in Great Britain, and on the continent of Europe. The Confederate States exercised, for four years, as complete dominion over the States which composed the Confederacy, as the United States ever exercised, in time of war, over any of the States. In the war of 1812-14, whenever the British obtained control and dominion over any portion of the territory of the United States, and held it for any considerable portion of time, the courts of the United States recognized such conquered territory as belonging for the time being to the territory of Great Britain, and its people as subject to her laws. The same principle must be applied to the possessions held by the Confederate States for the four years of the war.—See 3 Phillimore ch. 6; also, ch. 4-5.

From January, 1861, to May, 1865, the constitution and laws of the United States were completely suspended within almost the entire State of Alabama; and, during this time, another government, and other laws, were operating within the State, with all the powers of sovereignty. The people of Alabama owed no obedience, during that time, to the constitution and laws of the United States, because they received no protection from the United States. When the power to protect ceases, the duty of obedience ceases with it. The people were bound to obey the laws of the State during the four years of Confederate dominion, and owed obedience only to the power which was able to protect them.

A. J. WALKER, C. J.—The paper which was probably considered as a bill of exceptions, can not be regarded as such. That does not, however, affect the merits of the case; for the questions upon which the rights of the parties depend, are presented in a revisable form in the decree of the court.—Session Acts, 1857–8, p. 244.

Making reasonable intendments in favor of the correctness of the decree, we find from it that the appellee, the guardian of Mrs. Watson (then a minor), on the 24th June, 1863, invested four thousand dollars of his ward's funds in Confederate eight-per-cent. bonds; that he reported such investment to the court, within sixty days, and that he is credited with the amount actually and *bona fide* paid for those bonds. We further find that the guardian had on hand, at the close of the war, eighteen hundred dollars in Confederate treasury-notes, received during the war, and after the 9th November, 1861, in payment of debts due him in his trust capacity; and that there does not appear to have been either bad faith in its receipt, or negligence in its retention. The question of this case is, whether the allowance of these two credits was proper; and the determination of this question depends upon the validity of acts done in pursuance of the third and fourth sections of the act of 9th November, 1861, entitled "An act to authorize executors, administrators, guardians, and trustees, to make loans to the Confederate States, and to purchase and receive in payment of debts due them bonds and treasury-notes of the Confederate States, or of the State of Alabama, and coupons which are due on bonds of the Confederate States and of said State." Those sections are as follows

"All guardians, executors, administrators, and trustees, may purchase bonds of the Confederate States, or of the State of Alabama, for the estates they respectively represent, and may receive in payment of any debts due them as such, or due the estates they respectively represent, the treasury-notes of said Confederate States and of said State, the bonds of said Confederate States and of said State, and coupons which are due on bonds of said Confederate States and of said State." "All bonds, purchased, or received as aforesaid, shall be credited to the guardian, ex-

executor, administrator, or trustee, at the amount actually and *bona fide* paid for them, or at which they shall be *bona fide* received in payment; and all bonds so purchased or received shall be reported by the executor, administrator, guardian, or trustee, to the court having jurisprudence (jurisdiction) of the estate he represents, within sixty days after the purchase or receipt in payment of the same, unless good cause shall be shown to the court for not making the report within that time, or they shall not be so credited."

2. We decide, that under principles of law which now prevail, and are cognizable by the present courts of this State, guardians are justified in having yielded obedience, before the restoration of the authority of the United States, to the laws above quoted, and that they are entitled to credits for investments made and money received before that time under such law.

3. One argument against our decision is, that in the eye of a tribunal acting, as this does, in subordination to the constitution of the United States, and in recognition of its authority, the existence of the State of Alabama, and, of consequence, its legislative authority, must be deemed to have ceased when the ordinance of secession was passed, and the relation of the State to the Federal government repudiated, and its officers sworn to support the constitution of another and hostile organization, and the State itself placed in warlike antagonism to the United States.

We can not subscribe to the doctrine, that the existence of the State as a member of the Federal Union was destroyed. The acts of congress pending the late war, and the proclamations from the president, very clearly recognized the continuance of the State. The present president of the United States, in his proclamation of 21st June, 1865, in which he appointed a provisional governor of the State, and authorized the formation of a regular State government, very distinctly recognizes the existence of the State, but assumes that the people were deprived of a legitimate government. He therefore, by his proclamation, initiates the movement by which a legitimate government for a subsisting State could be established by the people thereof. The movement thus initiated was carried out by the pro-

visional governor to its consummation, in the formation of a constitution and the election of a full corps of State officers, including the judges of this court.

The orders and rules, in pursuance of which the people formed the present State government, can only be deduced from the authority of the president, as commander-in-chief of the army and navy, to secure a republican government to an *existing* State, whose people had overthrown legitimate government and were conquered by the United States. If the State had been reduced to the condition of a foreign country, conquered by the military power of the United States, it would scarcely be contended that the president's authority was equal to the task which he undertook and executed. Therefore, the proposition that the existence of the State never ceased, is at the foundation of the series of events which resulted in the bestowment of the judicial authority we exercise. An estoppel is upon the mouth of every officer of the State of Alabama, from denying the continued existence of the State as a member of the Federal Union.

Whether the government of the State was a *de jure* government, whose acts, so far as they conflicted with the constitution, or were hostile to the United States, were void, it is unnecessary here to decide. It is sufficient for the purposes of this case, to ascertain that there was a *de facto* government; and we proceed to submit the arguments in support of that position.

The condition of the State during the war was this: it existed, but its government was not in harmony with the constitution of the United States, and was in actual hostility to it. There was an exercise of every function of government. There was an actual government for every purpose, in the complete exercise of all its powers. It is so plain, upon the authority of the writers on international law, that this government was a government *de facto*, that it seems unnecessary to cite authorities, or consume time in support of the proposition. A different conclusion would open a Pandora's box of evils, to go forth and add to those already resting upon us. The State existed—there was a government of the State, which, though not acting

in subordination to the constitution of the United States, was a government in fact.

4. The legislative acts of a *de facto* government are not void, even though its wrongful existence be afterwards ascertained or decided, so far as they may have been executed, or had operation. All executed acts of a *de facto* government stand on as firm a basis, as if done by a *de jure* government.—3 Phillimore on International Law, chapters 4, 5, 6, and 7, of part 12, m. pp. 741, 742, 743 ; Lawrence's Wheaton on International Law, note 171, p. 522 ; *ib.* 580, note 181 ; *ib.* p. 653. So far has this doctrine been carried, that upon the overthrow of the dynasty of Napoleon, and the restoration of the countries subdued by him to their legitimate sovereigns, proprietors of domains acquired under the authority of their *de facto* rulers were maintained in their titles to the same, with a few exceptions in some of the inferior states of Germany, whose conduct is condemned by an eminent publicist as "discreditable."—3 Phillimore on International Law, m. pp. 718, 719. And in England it has been held, that treason against a *de facto* government could be punished after the restoration of the rightful sovereign.—Lawrence's Wheaton on International Law, 526, note.

To this doctrine it seems that the courts of the United States are fully committed. During the last war with Great Britain, a port in Maine was occupied by the enemy, from the first of September, 1814, until February, 1815. During this occupation, goods were imported, and after its cessation duties were claimed by the United States upon them. The supreme court of the United States overruled the claim, holding that the sovereignty of the United States was suspended ; that its laws could not be rightfully enforced there, or be obligatory upon the inhabitants, who remained and submitted to the conquerors ; that by the surrender the inhabitants passed under a temporary allegiance to the British government ; that they were bound by such laws, and such only, as it chose to recognize and impose ; and that from the nature of the case no other laws could be obligatory upon them, for where there is no protection, or allegiance, or sovereignty, there can be no

claim to obedience.—*United States v. Rice*, 4 Wheaton, 246. The same question was similarly ruled by Judge Story, on the circuit, in the case of *United States v. Hayward*, 2 Gal. 485.

The proposition, that in a civil war there cannot be a *de facto* government, set up by the party hostile to the pre-existing and established government, is not sustained, either by reason or the precedents. The validity of acts done in pursuance of the authority of a *de facto* government, is sustained, upon the ground that allegiance of the subject or citizen and protection of government are reciprocal, and that there is an overruling necessity that people should always have some government. It is, therefore, uniformly held, that when the authority of the rightful government is overthrown in any locality, and that of another established, for any considerable length of time, by the hands of either a foreign or domestic enemy, a *de facto* government exists, to the behests of which those within its jurisdiction may, and, indeed, must submit. Obviously, the reason of the rule applies with as much force, when the authority of the rightful government is overthrown by a domestic, as by a foreign enemy. We find no sanction for a distinction, referable to the source of the antagonism which results in a hostile government, in any of the books.

Grotius, in his work on War and Peace, (book 1, chap. 4, sec. 15,) says: "It now remains that we may say something of him that usurps the government, not after he has, either by long possession, or agreement, obtained a right to it, but so long as the cause of his unjust possession continues. And certainly, whilst he possesses the empire, his acts may be obeyed; yet, not as they are his out of right, for he has none; but upon this account, that it is probable he who has the right to govern, whether king, people, or senate, had rather that his laws should, during that time, be obligatory, than that the people being without laws and judgments, there should follow the utmost confusion." The author, after discussing the right of a private man to kill a usurper in certain cases, concludes, "in a controverted right, no private person ought to determine, but obey the present possessor"; and that "thus, Christ commanded to

'pay tribute to Cæsar', because the money had his image or superscription ; that is, because he was then in possession of the empire."

Foster, in his *Crown Cases*, (p. 188,) states the law as follows: "Protection and allegiance are reciprocal obligations ; and, consequently, the allegiance due to the crown must be paid to him who is in the full and actual exercise of the regal power, and to none other. I have no occasion to meddle with the distinction between kings *de facto* and kings *de jure*, because the warmest advocates for that distinction, and for the principles on which it hath been founded, admit that even a king *de facto*, in the full and sole possession of the crown, is a king within the statute of treason ; it is admitted, too, that the throne being full, any other person out of possession, but claiming title, is no king, within the act, be his pretensions what they may. These principles, I think, no lawyer has ever yet denied. They are founded in reason, equity, and good policy." A full discussion and historical review of the question will be found in the 4th Discourse of the same author, pages 396 to 412.

The doctrine of a *de facto* government is fully sustained in the pages last above cited, in reference to the civil wars which convulsed England, and caused frequent alternations of government between the rival claimants to the throne. Lord Hale declares, that the right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king, within the act on the subject of treason ; and that such was the House of York during the plenary possession of the crown in the reign of Henry IV, Henry V, and Henry VI.—1 Hale's *Pleas of the Crown*, 104.

Lawrence, an annotator on Wheaton's *International Law*, supplies to us authority upon this subject, as follows: "No exception was ever taken by the most scrupulous loyalist to the acceptance by Sir Matthew Hale of a seat on Cromwell's bench of judges ; nor did it operate as a disqualification for his holding the same position on the return of Charles II. No change, it is belived, has taken place in the judicial hierarchy of France, since the tumultuous days

of the first revolution, in consequence of her dynastic and other constitutional revolutions. In reference to the implied obligation of the conquered party, it is said by the most recent American author on international law, * * * that although there is a broad and obvious distinction, between an insurrection of a conquered city, or province, against the conqueror, and a revolution, it will be found, on examination, that they both rest on the same general principle—the relation of protection and allegiance, or the reciprocity of right and obligation.”—Halleck on Int. Law, 792.

The rulings in English jurisprudence generally excuse and justify obedience to *de facto* governments. A memorable exception is found in the execution of Sir Henry Vane, during the reign of Charles II, under the guise of a charge founded on acts done during the Cromwell government; and this is now condemned by publicists, as alike discreditable to the judges who ordered it, and to the monarch who permitted it.—1 Lord Campbell's Lives of the Chief-Justice, 494–6. On the contrary, law-writers approve the conduct of Sir Matthew Hale, a distinguished lawyer, and a jurist of remarkable purity and ability, who, though a loyalist sincerely attached to the crown, yielded obedience to the government of Cromwell, and sat in his parliament, and in that of Richard his son, and was a judge under the usurping and under the rightful dynasty.—1 Lord Campbell's Lives of the Chief Justices, 530–5.

The government of the United States, in all its departments, has contributed materials for argument that there was a *de facto* government in the seceded States. By law and proclamation, the people were declared enemies, and intercourse between them and the people of the loyal States was prohibited. The supreme court of the United States, in the *Prize Cases*, (2 Black, 673,) declared, that the rebellion was “no loose, unorganized insurrection, having no defined boundary, or possession; but that it had a boundary marked by lines of bayonets, which could only be crossed by force, and that south of that line was enemy's territory, because it was claimed and held in possession by an *organized, hostile, and belligerent power*.”

And in the case entitled “*Mrs. Alexander's Cotton*”,

(2 Wallace, 404,) it was held, without regard to the *animus* or conduct of a widow lady toward the United States, that because she resided in Louisiana, she was *in law* an enemy to the United States, and could have no standing in any of its courts. The United States exercised no actual authority of government within prescribed limits ; the people within those limits were enemies, entitled to no protection from it, could seek no redress for wrongs done them at the bar of its tribunals of justice, and could not hold intercourse with its people ; and within the prescribed area, an organized, hostile and belligerent power existed. Was this power a *de facto* government? If it was not, there was allegiance without protection, and a people unprotected by their rightful government, left without law, or the privilege of being governed by the power over them. Mrs. Alexander, if within the sovereignty of the United States—if at the time, for the purpose of the laws of war, a citizen of the United States—should have been permitted to prosecute her rights in its Federal tribunals. The denial of that right involves the assertion that she was, for the time being, without the sovereignty, as she was without the protection, of the United States.

Another argument advanced against our proposition is, that the Confederate treasury-notes were issued by a governmental organization in contravention of the authority of the United States, and for the purpose of making war upon it ; and that, therefore, a law which gave them currency, and contributed to enhance their value, must be void. But this argument loses all force, when it is considered that the right of the State to legislate is attributed to the existence of a *de facto* government, which was not within or under the sovereignty of the United States, which was in actual derogation of it, and the executed acts of which are not to be tried by the constitution or policy of the United States.

It cannot be argued, that the law in question was in conflict with the constitution of the *de facto* government, or of the political organization to which it had subordinated itself. It obviously did not impair the obligation of any contract. It gave no right to the debtor to tender anything but gold and silver in discharge of his debts, but

merely gave authority to receive the specified currency. It did not involve the exercise of judicial power. It is eminently legislative in its character. It is within the definition of law, "A prescribed rule of civil conduct." The distinction between a judicial and legislative act has been said to be, that the former is a determination of what the existing law is in relation to some particular thing already done or happened, while the other is a predetermination of what the law shall be for the regulation and government of all future cases falling under its provisions.—Sedgwick on Stat. and Const. Law, 167. Under this discriminating definition, the act is clearly legislative in its character.

If it be said that this law was unreasonable, and contrary to natural justice, we reply, in the language of this court, in *Dorman v. The State*, (34 Ala. 235,) "that while it is the duty of the judiciary to confine the legislative department within the constitutionally declared limits of its power, it has no right to set aside or annul a law, upon the mere ground that it conflicts with natural right, sound morality, or abstract justice."

The decree is affirmed.

BYRD, J., did not sit in this case.

BLUNT vs. BATES.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Presumption in favor of judgment.*—Where the bill of exceptions purports to set out all the evidence that was introduced in the court below, the appellate court will only make such intendments or presumptions in favor of the judgment, as might have been made by the court below, or by the jury under its instructions, on the facts stated.
2. *United States internal-revenue stamp on promissory note.*—Under the United States "stamp act" of 1863, (U. S. Statutes at large, 39th congress, 143,) it is not necessary that an internal-revenue stamp should be affixed to a promissory note executed in a foreign country, and payable generally, in order to make it admissible in evidence;

and if it was executed at any place within the United States, at which no collection district was at that time established, a stamp might be affixed to it, by "any party having an interest therein", at any time prior to the 1st January, 1867; and in the latter case, the cancellation of the stamp is not necessary.

3. *Attorney's authority to affix stamp to note.*—An attorney-at-law, in whose hands a note is placed for collection, has such an interest therein by virtue of his general authority, as authorizes him to affix an internal-revenue stamp to the note, when necessary to protect the interests of his client; and such act on his part will be presumed to have been authorized, until repudiated by his client.
4. *United States statutes in Alabama in 1864.*—There was no collection district for the United States internal revenue established in this State in 1864, nor were any of the statutes of the United States at that time actually in force in this State.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. JAMES COBBS.

THIS action was brought by Robert Bates, against Edward A. Blunt; was founded on a promissory note, which was described in the complaint, as "made by said defendant on the 1st day of February, 1864, and payable one day after date, with interest thereon from date"; and was commenced on the 22d October, 1865. The record does not show what pleas were filed; but the judgment-entry states, that the cause was tried on issue joined. "On the trial", as the bill of exceptions states, "the plaintiff offered to read in evidence to the jury the cause of action sued on; which was a promissory note, made and signed by the defendant, and dated the first day of February, 1864, in the sum of \$6,210.68, and contained no United States internal-revenue stamp; to which the defendant objected, as being allowed to go to the jury as evidence, because the said promissory note contained no internal-revenue stamp; which objection the court overruled, and allowed the plaintiff's attorney to place the necessary stamps required by law on the said note; to which ruling of the court, the defendant, by his counsel, at the time excepted. Thereupon, the plaintiff's attorney, after placing the said internal-revenue stamps on the said promissory note, without having cancelled the same in any manner whatever, proceeded to read the said promissory note as evidence to the jury in the cause, the gen-

Blunt v. Bates.

eral objection of the defendant thereto being overruled ; to which the defendant, by his counsel, at the time excepted. This was all the evidence in the cause ; and the court thereupon charged the jury, if they believed the evidence, to find for the plaintiff, for the amount of said note, with interest thereon to the present time ; to which charge the defendant, by his counsel, at the time excepted." The several rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

LOCKETT & BRAGG, and VARY & JOHNSTON, for appellant.
MOORE & BROOKS, *contra*.

(No briefs have come to the hands of the reporter.)

BYRD, J.—The main question in this cause is, whether the court below erred in allowing a promissory note, made in February, 1864, as described in the complaint, to be introduced in evidence to the jury, without being stamped, and the stamp cancelled. If it was admissible, the charge of the court is correct ; for it fully met the requirements of *the rule*, that the plaintiff must prove substantially the allegations of the complaint, to entitle himself to a recovery.

The bill of exceptions purports to set out all the evidence introduced on the trial of the cause, and it must, therefore, be considered as all that was introduced on the trial to the court or jury. No presumptions, therefore, can be indulged, to sustain the rulings of the court. This court can only make such intendments and presumptions as the court below, or the jury under the instructions of the court, were authorized by law to make, from the facts contained in the bill of exceptions.

Whether the note introduced in evidence was made in the United States, or out of them ; whether in the State of Alabama, or beyond its limits, or whether in a State where there was no collection district established at the time it was made, or not, are all questions capable of solution by evidence.

Was the note admissible in evidence? The appellant

contends that it was not, and that the court should have excluded it from the jury, on the ground that the note was not stamped, and the stamp cancelled, as required by the laws of the United States; and further, that the presumption of law is, that the note was executed in a State where there was a collection district established at the date of its execution.

It seems that the cause was tried on the general issue, which devolved on the plaintiff the necessity of making out a *prima-facie* case, in order to entitle him to a verdict and judgment. The introduction in evidence of the note to the jury, under such an issue, makes out such a case.

But it is said the court erred, under such an issue, in allowing the note to be read in evidence without a proper stamp and cancellation thereof. Without deciding whether the appellant has properly raised the question that no stamp was *affixed* to the note, under the phrase that it "contained no internal-revenue stamps," so as to avail himself of an objection to the note for the want of a proper stamp, we will proceed to discuss the question as though it was sufficiently made in the court below.

Under the stamp act, if the note was made in the United States, it was the duty of the maker, at the time it was executed, to stamp it, and cancel the stamp; and upon his failure, the payee was authorized, in certain cases, to do so. If the note was made in a foreign country, payable generally, then it was unnecessary to stamp it to give it validity. If it was made in the United States, in a place where no collection district was established at the time it was made, then, any party having an interest therein might affix the proper stamp thereto, prior to the 1st January, 1867.—U. S. Statutes at large, 39th congress, 143.

An attorney has a lien on the papers placed in his hands by his client, for the payment of his fees.—*St. John v. Deindorf*, 12 Wendell, 261; Story on Agency, § 383. He therefore has an interest in the note sued on, by virtue of the lien which the law confers. It would seem from the authorities that an attorney-at-law, to whom a note is delivered for collection, has the power, under the authority thus conferred, as a general rule, to do all acts which the

client could do, necessary to protect his right, and which are beneficial to him; and such acts will be presumed to be authorized, until repudiated by him.—*Kirksey v. Jones*, 7 Ala. 623; *Pond et al. v. Lockwood*, 8 Ala. 675. This case is not within the influence of any exception to that rule.

The last *proviso*, on page 143, of section 9 of that act, is a provision in favor of any instrument embraced within the letter of that act, and the act to which it is an amendment, and takes them out of the other provisions of both acts. The *proviso* only requires such instruments to be stamped, prior to the 1st of January, 1867; and, if so stamped, makes them as valid to all intents and purposes as if stamped by the collector. The *proviso* does not require the party to *cancel* the stamp; and being a penal statute in part, we must construe it strictly for the protection of the citizen, and, *perhaps*, liberally for the public on a question of revenue *merely*.

If the note was "signed or issued at a time when, and at a place where, no collection district was established," then it was not necessary to cancel the stamp to make the note valid, however it may have been necessary to do so under the regulations of the treasury department for other purposes. If the note was "signed or issued" in this State, in 1864, then there was no collection district established here; and the note being stamped as required by the act, the court did not err in allowing it to be read in evidence. Besides, under the influence of the opinion in the case of *Watson and Wife v. Stone*, delivered at the present term of the court, the laws of the United States were not *actually* in force in this State when the note was made; and therefore the revenue laws, then enacted, could not render void, or invalidate, a note which was made under the circumstances of this one.

The court, under *the facts of this cause*, could have instructed the jury, that the legal presumption is, that the note was "signed or issued" in this State at its date.—*Hargrove v. Smith*, 1 Ala. 801; *Smith v. Robinson*, 11 Ala. 270. But no charge was asked or given on this point, unless it is involved in the charge given.

The party excepting must clearly and affirmatively show

error ; otherwise the judgment of the court below must be affirmed.—*Knapp v. McBride et al.*, 7 Ala. 19 ; *Smith v. Robinson*, *supra*. If the note was “signed or issued” in a State where there was a collection district established at its date, then there would be much force in the position of appellant ; but he fails to show that such was the fact, and the court or jury could not presume its existence, as it would have involved both appellant and appellee in a violation of the law ; and this should never be done, when a presumption of innocence can be indulged.

It results that the court below did not err, and its judgment must be affirmed.

NOTE BY REPORTER. —The following opinion was delivered, on a subsequent day of the term, in response to an application for a re-hearing by the appellant’s counsel :

BYRD, J.—Since the decision of this cause, the appellant has sued out a writ of error to the supreme court of the United States, and afterward filed an application for a re-hearing in this court. Without considering the effect of these proceedings on each other, and without replying to the positions taken by the counsel for appellant in their argument for a re-hearing, we are satisfied with the result attained in the above opinion. The objection of the counsel of appellant in the court below was, that the “note contained no internal-revenue stamps,” and that the court “allowed the plaintiff’s attorney to place the necessary stamps on the said note” ; and he now insists that “to place” is not to *affix*. It is sufficient to say, if the words “to place” are not equivalent to the word “affix,” they are at least as appropriate as the word “contained” used by the counsel in making his objection. We have not decided that the word “contained” raises the question of a failure to stamp.

It seems that the revenue law only declares such instruments void, when issued with intent to defraud ; and it is difficult to see how such “intent” could exist on the part of the appellant when he executed the note, or of the appellee

when he received it, when there was no collection district established in this State when the note was executed and received by the parties.

Application refused.

DOCKERY vs. McDOWELL.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Receipt of Confederate money by administrator, and investment in Confederate bonds.*—Under the provisions of the act of the legislature approved on the 9th November, 1861, (Session Acts, 1861, p. 53,) an administrator was authorized, during the war, to receive treasury-notes of the Confederate States in payment of debts due the estate; and if he invested such treasury-notes, prior to the expiration of eighteen months from the grant of his letters, in four-per-cent. Confederate bonds, and failed to report such investment to the probate court within the time required by the statute, he is not chargeable on account of the investment, at the instance of distributees or creditors, except on affirmative proof of consequent injury to the estate, and only to the extent of that injury. (BYRD, J., *dissenting*, held that the said act of November 9, 1861, did not authorize an investment in four-per-cent. bonds; that such investment, not being authorized by law, was not ratified by the ordinance of the State convention, No. 26, adopted on the 28th September, 1865; that the administrator was chargeable, at the instance of the distributees or creditors of the estate, with the amount of funds so invested, as for any other unauthorized conversion of the assets; and that the subsequent act of the legislature, approved on the 23d February, 1866, could not legalize it.)
2. *Compensation of administrator on receipts and disbursements.*—Under the statute regulating an administrator's commissions on receipts and disbursements, (Code, § 1825,) his per-centage on receipts in Confederate money, during the war, should be allowed out of the Confederate money remaining in his hands at the time of the settlement; on disbursements in such funds, during the war, his per-centage should be calculated on the basis of the benefit to the estate by the disbursements; and on receipts and disbursements in United States currency, since the war, the per-centage should be allowed in that currency.
3. *Allowance for special or extraordinary services.*—An administrator is not entitled to an allowance for "special or extraordinary services,"

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(Code, § 1825,) on proof that, while in an adjoining county on other business, he made inquiry in relation to the evidence in two suits there pending against the estate, and in relation to the witnesses by whom certain facts could be proved, and had several conversations with his attorney in reference to the suits.

APPEAL from the Probate Court of Wilcox.

IN the matter of the final settlement of the accounts and vouchers of John R. McDowell, as the administrator of the estate of William W. Robinson, deceased. Letters of administration on the estate of said decedent were granted to said McDowell, on the 15th July, 1863. A petition by the administrator for the sale of certain personal property belonging to the estate, at the salt-works in Clarke county, for the payment of debts, and an order of sale founded on the petition, are copied into the transcript immediately after the order granting letters of administration to McDowell; but both are without date. On the 1st August, 1863, the administrator filed an inventory and appraisement of the property in Clarke county, and a return of the sale of the property; both of which were ordered to be recorded. On the 6th August, 1863, the administrator filed a petition asking for an order to sell all the personal property belonging to the estate in Wilcox county, except slaves, for the payment of debts; and an order of sale* was granted on the same day. On the 17th August, 1863, the administrator filed another petition, asking an order for the sale of kettles, furnaces, &c., at the salt-works in Clarke county, for the payment of debts; and an order of sale was granted on the same day. On the 20th August, 1863, the administrator filed an inventory and appraisement of the property of the estate, which purports to have been made by appraisers previously appointed. On the 26th October, 1865, the administrator reported the estate insolvent; and on the 11th December, 1865, it was so declared by the court, without any contest on the part of the distributees or creditors, and the administrator was ordered to file his accounts and vouchers for a final settlement on the second Monday in February, 1866.

The administrator having filed his accounts and vouchers, and objections to the allowance of several of the items

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specified in the account having been filed by C. J. Dockery, one of the creditors of the estate, the case was finally heard on the 26th March, 1866. On the hearing, as the bill of exceptions states, the administrator asked a credit for the sum of two thousand dollars, as per voucher No. 57 in his account-current, which was a certificate issued by the Confederate States depository at Selma, on the 12th March, 1864, in these words: "This will certify, that the estate of W. W. Robinson has paid in at this office *two thousand dollars*, for which amount registered bonds of the Confederate States of America, bearing interest from this date at the rate of four per cent. *per annum*, will be issued to him, under the 'act to reduce the currency, and to authorize a new issue of notes and bonds,' approved February 17, 1864, upon the surrender of this certificate at this office." To the allowance of this voucher, as a credit to the administrator, said Dockery objected, "on the following grounds: 1st, because there was no order of court, allowing or authorizing the investment of the moneys of said estate in such way; 2d, because said administrator did not report said investment to the court having jurisdiction of the estate he represented, within sixty days after the investment; 3d, because the laws of Alabama, authorizing or allowing the investment of funds belonging to estates in Alabama, in bonds of the Confederate States, or in four-per-cent. certificates of the Confederate States, or in any bonds or certificates of the Confederate States, are contrary to the laws of the United States, and null and void." "The said voucher itself," the bill of exceptions states, "was the only evidence offered in its support, and all the evidence offered on the question of its allowance." The court thereupon overruled said Dockery's objections to the allowance of said voucher, and allowed the administrator a credit for two thousand dollars as claimed; to which said Dockery reserved an exception. "It was agreed, however, that the property of the estate was sold by the administrator for Confederate money."

"The administrator moved the court to allow him the sum of five hundred dollars, in the present currency of the country, commonly called 'greenbacks' and 'national cur-

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rency', for his commissions as administrator on said estate; to which said Dockery objected; but the court overruled his objections, and made said allowance of five hundred dollars for commissions to said administrator; to which ruling and allowance said Dockery excepted."

"The administrator asked the court for an allowance of one hundred dollars, for special and extraordinary services rendered the estate; and, to sustain his motion for such allowance, introduced S. G. Cochran as a witness, who testified, that there were two suits pending in the circuit court of Wilcox against said John R. McDowell, as administrator of said estate; that while said administrator was in Clarke county, on other business, he made inquiry in relation to the evidence in said causes, and in relation to the witnesses by whom certain facts in the causes could be proved; that said administrator had several conversations with witness in relation to said causes; and that said causes had never been tried, but are still pending in said circuit court. This being all the evidence offered in relation to said claim of one hundred dollars for special or extraordinary services, the court allowed the same; to which the said Dockery excepted."

The final decree of the court, after stating the necessary preliminaries, proceeds thus: "Upon which auditing and examination it appears, that said administrator has received of the assets of said estate, in Confederate States currency and securities, the sum of seventeen thousand seven hundred and sixteen 54-100 dollars; and that he has legally and justly expended for said estate, in Confederate currency, the sum of ten thousand three hundred and fifty-nine 98-100 dollars, leaving a balance in his hands, in said Confederate States currency, of seven thousand three hundred and fifty-six 54-100 dollars, for which he is credited; that he has also received, and is chargeable with, the further sum of eight hundred and forty-eight 64-100 dollars, in 'greenbacks', or 'national currency', and has legally and justly expended for said estate, in the same currency, the sum of eleven hundred and fifty-five 13-100 dollars, for which he is credited; leaving a balance due said John R. McDowell, from said estate, of three hundred and six 49-100

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dollars, in national currency, which amount said John R. McDowell is hereby adjudged to be entitled to recover from said estate, and for which let execution issue as the law directs."

The several rulings of the court to which exceptions were reserved, and the final decree, are now assigned as error.

S. J. CUMMING, for appellant.

PETTUS & DAWSON, *contra*.

A. J. WALKER, C. J.—Upon the principles settled in the case of *Neilson v. Cook*, at the present term, the administrator had authority to receive Confederate treasury-notes. His investment in four-per-cent. bonds, for which he received the certificate entitling him to the bonds, it is contended, should have been reported according to the terms of the 4th section of the act of 9th November, 1861.—Pamphlet Acts, p. 53. If that be admitted, it can not affect the result; for, before the administrator could be charged on account of the investment of Confederate treasury-notes in that way, it should appear that the estate was injured thereby. This does not appear to our satisfaction. The administrator was not required to pay the debts of the estate until eighteen months had expired, and that period did not expire until the 15th January, 1864. The case must be reversed upon another ground; and if it should appear, upon a future trial, that the estate sustained detriment by the investment in four-per-cent. bonds, and that the investment was not reported as required by the statute, then the administrator should be charged, to the extent of the damage. We can not distinguish between an investment in four-per-cent. certificates, and an investment in bonds. The money was paid for the bonds, and the certificates were issued as evidence of the right to the bonds, which were to be delivered at a future time.

2. We think the statutes regulating the compensation of administrators by two and a half per cent. on receipts, means two and a half per cent. of that which was received. If the administrator, at the time of settlement, had on hand Confederate money, he should have been allowed an

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amount equal to two and a half per cent. of the Confederate money received by him, out of the Confederate money so on hand. Upon the disbursements of the Confederate money, the equitable and just rule (and we therefore adopt it) is, that he should be allowed two and a half per cent. upon a sum equal to the value of the benefit bestowed upon the estate by the disbursement. Upon the receipts and disbursements of United States currency, the administrator was entitled to two and a half per cent. out of that currency.

3. Upon the facts proved, the administrator was not entitled to any thing for special or extraordinary services.

In so far as the rulings of the court below vary from the principles above stated, they are erroneous.

Reversed and remanded.

BYRD, J.—It is a fundamental principle of the common law, well and firmly supported by reason and authority, that the legislative department of the government cannot divest a citizen of a *lawfully* acquired right or title to property; and the maxim, *nemo potest mutare consilium suum in alterius injuriam*, is a principle of the common as well as the civil law; and is applicable, in a free government, as well to the government as to individuals.

This principle, and the application I shall make of it to the facts of this cause, are sustained by the reasoning and authority of the following adjudications and references:

Bracton, lib. 4, fol. 228; 2 Inst. 292; 1 Black. Com. 41, 91, 161–2; 1 Fonb. Eq. ch. 1, § 3; Story on Const. § 1399; 1 Bish. Mar. & Div. 776–84; 10 Mod. 115; *Gilmore v. Shuter*, 2 Lev. 227; 3 Rep. 118 a; *City of London v. Wood*, 12 Mod. 637; 1 Kent's Com. 448–508; *Day v. Savage*, Hob. 87; *Bonham's case*, 8 Rep. 115; *Wilkinson v. Leland*, 2 Peters, 657; 8 Wheaton, 493; *Ogden v. Blackledge*, 2 Cranch, 272; *Dash v. Van Kleeck*, 7 John. 447; *Ham v. McClaws*, 1 Bay, 93–8; *Bowman v. Middleton*, 1 Bay, 152; *Commonwealth v. Worcester*, 3 Pick. 462–72; *Bates v. Kimball*, 2 D. Chip. 77–89; *Medford v. Learned*, 16 Mass. Rep. 215–17; *Calder v. Bull*, 3 Dal. 386; *Cochran v. Van Surley*, 20 Wendell, 365–73; *Varick v. Smith*, 5 Paige, 157–9;

Bloodgood v. Railroad, 18 Wend. 9-56; *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Williams v. Robinson*, 6 Cush. 333; *Van Horne v. Dorrance*, 2 Dal. 304; *Goshen v. Stonington*, 4 Conn. 209-25; *Merrill v. Sherburne*, 1 N. H. 199-213; *Lyman v. Mower*, 2 Verm. 517; *Ward v. Barnard*, 1 Aiken, 121-7; *University v. Williams*, 9 Gill & J. 365; *Sharp v. Bykerdyke*, 3 Dow. 102; *Fletcher v. Peck*, 6 Cranch, 87, 135; *Wheat v. The State*, Minor, 199; *Taylor v. Rushing*, 2 Stew. 160; *ib.* 228; 2 Stew. & Por. 199; 2 Ala. 54; *Bloodgood v. Camack*, 5 Stew. & Por. 267; 15 Ala. 730; *Weaver's Ex'rs v. Weaver's Creditors*, 23 Ala. 789; *Walker v. Chapman*, 22 Ala. 116; *Mays v. Williams*, 27 Ala. 267; 23 Ala. 168; *Steamboat Company v. Barclay et al.*, 30 Ala. 120; 31 Ala. 552; *Tenn. R. R. Co. v. Moore*, 36 Ala. 371; 19 Ala. 438; *Falconer v. Campbell*, 2 McLean, 195; *Sutherland v. DeLeon*, 1 Texas, 250.

These authorities are not harmonious; but giving them all a fair consideration, I adopt the principle above announced, and make the application of it to the facts of this case, as is hereinafter made.

In the case of *Dash v. Van Kleeck*, (*supra*,) Kent, C. J., says: "It is a principle in English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect."—1 Black. Com. 161-2. In the same case, he further says: "It is not pretended that we have any express constitutional provision on the subject; nor have we any for numerous other rights dear to freedom and to justice. An *ex-post-facto* law, in the strict technical sense of the term, is usually understood to apply to criminal cases; and this is its meaning when used in the constitution of the United States; yet laws impairing previously acquired civil rights are equally within the reason of the prohibition, and equally to be condemned. We have seen that the cases in the *English* and *civil* law apply to such rights; and we shall find, upon further examination, that there is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right."

In the case of *Ogden v. Blackledge*, (*supra*,) the court con-

sidered the point too plain for argument, that a statute could not retrospect so as to take away a vested civil right." See, also, *Bowman v. Middleton*, *supra*.

The constitution of the United States prohibits any State from passing a law impairing the obligation of contracts; and by the 5th article of the amendments thereto, it is expressly provided, that "private property shall not be taken for public use, without just compensation." I cannot see how, in the face of these fundamental guaranties, private property can be taken for private use, or how vested rights to property can be divested, or abrogated, by the legislative department of the government. If the obligation of contracts is so carefully and sacredly guarded by the Federal and State constitutions, certainly the vested right which the owner has to the property conveyed by a contract is equally well protected; as well after as before the property is reduced to actual possession. It would be a singular anomaly if it is to be held that the obligation of a contract cannot be impaired by the legislative department, and yet it is competent to impair or destroy *the right* to the chose in action, or other thing transferred by the contract, after being reduced to possession. If private property cannot be taken for public use, it cannot for private, without just compensation.

If, in the regulation of the remedy, the collection of a pre-existing debt is unnecessarily delayed, impairs the obligation of a contract, as some high authorities hold, would it not be monstrous to hold that the vested right of the contract *itself*, or any chose in action, could be impaired or abrogated by the legislature? I hold that there is a broad line between its power over the regulation of the remedy and use of property, and its power to impair or defeat the right to property. The first power exists, the latter does not; and the only difficulty about that line is in ascertaining what is matter of remedy, and what of right. A State convention is not competent to violate the constitution of the United States, or deprive any one of the guaranties of that supreme law of the land.

Upon the grant of letters of administration, the legal title to the personal property of the deceased, within the

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jurisdiction, is vested by law in the administrator ; but the distributees have a vested beneficial interest in such property, subject to the rights of creditors and costs of administration ; and such interest is several and not joint, and may be transferred or assigned by each before distribution. *Maury's Adm'r v. Mason's Adm'r*, 8 Porter, 233 ; *Br. Bank v. Wade*, 13 Ala. 429 ; *Gould v. Hayes*, 19 Ala. 438 ; 16 Ala. 494 ; 11 Ala. 613 ; 25 Ala. 285 ; 33 Ala. 57.

It was held in *Weaver's Ex'rs v. Weaver's Creditors*, (*supra*,) by this court, that an executor had no vested right, *personal to himself*, in the office of executor, which would prevent the legislature from enacting a law, the effect of which, in the case of the insolvency of the estate, would deprive him of such office ; but, at the same time, the court held, that he could not be deprived by statute of a vested personal right. This being so, it certainly results that the creditors, distributees, or legatees, could not be deprived of their rights or interest to or in the estate, by legislative enactment. It is true that, in the one case, the law alone may confer the right, and in the other the will of the testator and the law ; but this can make no distinction—the rights of each are equally sacred and inviolable.

In the case of *Society, &c., v. New Haven*, (8 Wheaton, *supra*,) Justice Washington, delivering the opinion of the court, says : "If, for example, a statute of descents be repealed, it has never been supposed that *rights* of property already vested during its existence were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests."

So far as the case of *Bryan et al. v. Weems*, (21 Ala.) is in conflict with these views, it is not held by me as authority on the question under consideration.

The appellee relies upon the fourth section of an act approved February 23d, 1866, (Pamphlet Acts, 114,) to sustain the allowance by the court below of voucher No. 57 as a credit to him. The credit claimed was a four-per-cent. Confederate States certificate, for two thousand dollars, in which the funds of the estate had been invested. If the administrator made the investment under the authority of

the act of the 9th November, 1861, (Pamphlet Acts, 1861, p. 53,) he failed to show that he had complied with the provisions of that act. But that act does not authorize an investment in *four-per-cent. certificates*. It can not be conceived that the legislature, by the act of 1861, intended to authorize an investment in four-per-cent. bonds or certificates, as no such bonds or certificates were then in existence, or authorized to be issued. The only bonds then issued, or authorized to be issued, were bonds bearing eight per cent. interest, and the legal rate of interest by the State law was eight per cent. He is, then, forced to rely upon the act of 1866, referred to above, or the 26th ordinance of the State convention of 1865. The latter requires, not only that the act should be done under color of law, but in good faith, and in pursuance of law, to entitle the party to its protection; and I have shown that it was not done in pursuance of law, or color of law, nor was there any evidence that it was done in good faith; though, if the law had been complied with, the court *might* presume that the investment was made in good faith. However this may be, for I do not intend to intimate any opinion on the question, I am satisfied that the ordinance affords no protection to appellee.

The investment not having been authorized by law at the time it was made, it can not, by a subsequent act of the legislature, be so legalized as to deprive the creditors and distributees of their right to the money so invested, or to hold the administrator liable for its conversion, even if it was Confederate money; for a conversion of anything belonging to an estate, by the trustee, implies injury—the amount alone must be proved. Such a result would be in conflict with the principle, or maxim, *nemo potest mutare*, and the precedents furnished, in the above adjudications referred to, for its application.

Neither the act of 1861, nor any subsequent act, authorized the appellee to invest in four-per-cent certificates, or any other certificates. Nor does the act of 1866 ratify or attempt to ratify an investment in such certificates.

Whether the appellee should account for, or be charged with, the two thousand dollars so invested, I intimate no

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opinion. That will depend upon facts which, perhaps, are not shown by the record; but may be on another trial in the court below.

The conformity of the acts, passed by the State legislature during the late war, authorizing the investment of trust funds in Confederate bonds, to the national constitution, does not lie across the line of my argument, and I do not deem it necessary to intimate any opinion upon that very grave and interesting question. The main question is, whether voucher 57 is a legal credit in favor of the appellee; and I hold that it is not, *even* if those acts were valid and constitutional. And I further hold that the act of 23d February, 1866, gives no validity to that voucher.

My brethren agree with me in the result, but upon other grounds, as stated in their opinion. The decree of the probate court is reversed, and the cause remanded.

PHILLIPS *vs.* COSTLEY.

[BILL IN EQUITY TO PROCURE LEGAL TITLE TO LAND.]

1. *Admissibility of parol to vary writing.*—Where a contract for the sale of lands is reduced to writing, and is plain and unambiguous in its terms, the subsequent declarations or admissions of the purchaser, as to the estate or interest purchased by him, can not be received to vary or contradict the writing.
2. *Proof of sale under decree in chancery.*—A sale of land under a decree in chancery to enforce a vendor's lien, must be proved by the record of the proceedings, or a certified copy thereof, and can not be established by the oral statements of witnesses.
3. *Notice implied from possession.*—A purchaser of land which is in the possession of a third person, without inquiry into the nature and character of that possession, is chargeable with notice of all the equitable rights which are binding on his vendor.

APPEAL from the Chancery Court of Tallapoosa.
Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed on the 28th April, 1858, by William Costley, against James D. Phillips, Claudius B. Henderson, John R. Henderson, Isaac Morris, William Davidson, Dozier Thornton, and the personal representative and heirs-at-law of Alexander Burns, deceased ; and sought to procure the legal title to an undivided moiety of a certain tract of land, which was particularly described in the bill, and which the complainant claimed under a purchase from said Claudius B. Henderson. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and directed the defendant Phillips to execute a deed to him. From this decree the said Phillips appeals, and here assigns it as error.

BROCK & BARNES, for appellant.

W. P. CHILTON, *contra*.

JUDGE, J.—On the third of May, 1852, Alexander Burns, being in the possession and claiming to be the owner, sold to Claudius B. Henderson the following described real estate, to-wit : The north-west quarter of section seven, and the east half of the south-west quarter of the same section, in township twenty, range twenty-four ; also, an undivided moiety of three acres square, and of the saw and grist-mills thereon, situate in the north-west corner of section eighteen, in the same township and range ; the whole situate in the county of Tallapoosa. Burns executed to Henderson a bond, conditioned to make a title when the purchase-money should be paid. About the same time, C. B. Henderson purchased of Isaac Morris the other moiety of the three acres above described, and of the mills thereon. After these purchases, respectively, C. B. Henderson claimed to be the owner of the *entire* premises ; and on the 25th of October, 1853, sold to William Costley, the appellee, “one undivided half-interest” in the three acres above described and mills thereon, and also in the the three eighties in section seven, above described, making one undivided moiety of the entire premises, for the sum of one thousand and seventy dollars, which was paid by Costley at the time of the purchase. C. B. Henderson executed his bond to Cost-

ley to make him a title, "by the first day of January, 1854," and, contemporaneously with his purchase, Costley took possession of the premises, and retained such possession, as it appears, until after the commencement of this suit. C. B. Henderson, by some agreement, invested John R. Henderson with the remaining moiety of the premises, who sold the same to the said Alexander Burns, on the 18th of July, 1854. Burns took possession of the moiety thus acquired by him, and held it as co-tenant with Costley, until the death of Burns, which occurred in November, 1856.

Burns never made a title to C. B. Henderson. He was present at the sale by C. B. Henderson to Costley, witnessed the execution of the bond for title, and represented to Costley that the interest he was purchasing was unincumbered. He also represented that he, Burns, would soon procure the legal title to the premises, and would convey the same, in accordance with his obligation to Henderson, so that Costley might get a title. But, prior to Burns' death, by some arrangement with the appellant Phillips, he caused Phillips to be invested with the legal title to the entire premises. Phillips claims that he purchased from Burns for a valuable consideration, without notice of Costley's claim to one undivided moiety; and also insists that the interest purchased by Costley, from C. B. Henderson, was the *identical* interest which Henderson had purchased from Isaac Morris; that this interest had been sold under a decree of the court of chancery, to pay the purchase-money due for the same, by Henderson to Morris, and that he, Phillips, became the purchaser at said sale; and for these reasons, it is contended, Costley was not entitled to the relief sought by him in the court below.

[1.] The evidence relied on to show that complainant in the court below purchased of C. B. Henderson the identical interest which Henderson had purchased of Isaac Morris, are declarations of the complainant to that effect, testified to by several witnesses. In regard to such declarations, Mr. Greenleaf has said: "It frequently happens, not only that the witness has misunderstood what the party said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement com-

pletely at variance with what the party actually did say." 1 Greenl. Ev. § 96.

But a well-known rule of evidence requires us to discard these declarations in determining the question as to what interest complainant did buy from C. B. Henderson, because the contract showing the interest thus acquired is in writing, is plain and unambiguous in its terms, and must be its own expositor; and the declarations of the complainant, as to its legal effect, are not competent evidence.—1 Greenl. Ev. § 96, and authorities referred to in note 2. The contract shows that complainant purchased of C. B. Henderson "an undivided half-interest in three acres square of land, in the north-west quarter of section eighteen, in township twenty, range twenty-four, and also one undivided half-interest in the grist-mill and saw-mill, and also in the east half of the south-west quarter, and the north-west quarter of section seven, in township twenty, range twenty-four." Nothing is said in the contract about the undivided moiety of the mill tract and mills, which had been purchased of Morris. The purchases of C. B. Henderson, from Morris and Burns, had centred the ownership of the entire property in him; and in selling by undivided moieties, he did not designate in either contract with his vendees from what particular source he had derived the interest sold to each; and he sold to the complainant a greater interest than he had acquired from Morris, to-wit, an undivided moiety of the three eighty-acre tracts of land, situate in section seven. The ownership of the interest which had been sold to the complainant, made him a tenant in common of the estate with the owner of the other undivided moiety thereof, who was at first John R. Henderson, and then Burns, until the period of Burns' death; and, though tenants in common are deemed to have several and distinct freeholds, *they have no separate estate in any part of the land*. Each is considered to be severally and solely seized of his share; they are seized *per my*, but not *per tout*.—2 Black. Com. 192; 4 Kent's Com. 367; 2 Bouvier's Inst. 313.

It results, then, from the contract, or the nature of the estate created by it, that the complainant could not have purchased the separate and identical interest which Morris

had sold. If there had been a sale of this interest under a decree in chancery, for the purpose before stated, the purchaser, by virtue of his purchase, would have become a tenant in common of the mill tract and the mills thereon, with the complainant and Burns, and his interest would have been an undivided moiety thereof. This would have reduced the interest of complainant and Burns, in the particular estate, to an ownership between them, of the remaining undivided moiety; and thus the loss to them, by the diminution of the quantity of the estate, would have fallen upon each in equal proportion, but each would have had his remedy against his immediate vendor.

2. But we need not pursue this line of argument further, nor decide what effect such a result would have had upon the case of complainant; for the record fails to show, by legal and sufficient evidence, that there ever was such a proceeding in chancery. The statements of witnesses, that there was a sale under such a decree, is not the evidence which the law requires to establish the fact that the interest which had been sold by Morris was subjected to sale under the vendor's lien, by a bill in equity. To establish this fact, if it existed, the record of the proceedings, or a properly certified transcript thereof, should have been introduced in evidence. There being no such testimony in the cause, our decision must rest upon the hypothesis that no such bill was ever filed. The averment by Phillips, in his answer, that he purchased the interest which had been thus sold, stands unsupported by any evidence.

[3.] We come next to inquire, whether Phillips was a *bona-fide* purchaser from Burns, without notice of the claim of complainant. The evidence very clearly establishes the fact, that the complainant went into the possession of the interest purchased by him, at the time of his purchase, and that he held such possession continuously, to a period of time which was subsequent to the acquisition of the legal title by Phillips. This possession was sufficient to put Phillips on inquiry, before he acquired his title; and what is sufficient for this purpose, is equivalent to notice. The doctrine is well settled, that a purchaser of land which is in the possession of a third person, without inquiry into the

nature and character of that possession, is chargeable with notice of all the equitable rights which are binding on his vendor.—Shepherd's Digest, p. 701, §§ 28, 32. Phillips, then, cannot successfully invoke to his aid this defense; and we may remark, in this connection, that the allegations of the answer as to his purchase *from Burns*, are not supported by evidence. It is averred that moneys were advanced, and debts and liabilities assumed, for Burns, to the extent of twenty-eight hundred and seventy or eighty dollars; that, at first, the bonds for title of two of the prior vendors of portions of the premises, (Thornton and Davidson,) were delivered to him as a security for his advancements and assumptions; but that subsequently, on paying the amount above stated, which was the full value of the premises, he purchased the same from Burns, for that sum. There is no evidence that Phillips ever assumed or paid any debt for Burns, other than the amount of a promissory note, payable to John Britton, for one hundred and ninety-four 57–100 dollars, due the 25th of December, 1855, which Phillips paid on the 24th of March, 1856. There is no evidence showing on what consideration this note was given; and its payment constitutes the sum total of all the value shown to have been paid by Phillips, for the legal title, which he holds, to the premises in question. Britton held a mortgage from Burns, to secure the payment of this note, on one undivided moiety of the mill tract and mills, and on other lands in no way involved in this suit. This mortgage by Burns cannot affect the rights of the complainant, who seeks to have vested in him the legal title to one undivided moiety only of the premises purchased and paid for by him, and which Burns, under the circumstances, could not incumber, either by sale or mortgage.

Let the decree of the chancellor be affirmed, and the cause remanded for further proceedings pursuant thereto. The appellants must pay the costs of this court.

KIRBY *vs.* KIRBY'S ADM'R.

[APPLICATION FOR REVOCATION OF PROBATE OF NUNCUPATIVE WILL.]

1. *Probate of nuncupative will.*—The mode of making probate of nuncupative wills, prescribed by statute in this State, is the only form authorized by law, and is, in effect, probate in "solemn form," or "form of law," as distinguished from probate in "common form."
2. *Notice of probate.*—By the settled practice in this State, if a will is admitted to probate without notice to the persons who are by law entitled to notice, the probate will be revoked on their application; but, under the statute which was of force in 1847, (Clay's Digest, 597, § 3,) non-resident distributees or heirs-at-law were not entitled to notice of the probate of a nuncupative will, and, therefore, could not have the probate revoked on account of the want of notice.
3. *Probate of nuncupative will.*—A decree of the probate court, in these words: "The nuncupative will of W. K., deceased, having been duly proved by the oaths of J. B. C., A. P. B., and J. W. W., the subscribing witnesses thereto, the same is adjudged and decreed to be filed and recorded," is a sufficient and valid probate of the will, if it be a will.

APPEAL from the Probate Court of Madison.

IN the matter of the estate of William Kirby, deceased, on the application of John Kirby and others, claiming to be the heirs-at-law of said decedent, for the revocation of the probate of his nuncupative will. The decedent died on the 30th December, 1846. The decree of said probate court, in the matter of the probate of his will, was rendered on the 26th April, 1847, and was in these words: "The nuncupative will of William Kirby, deceased, having been duly proved by the oaths of J. B. Coons, Albert P. Boone, and Joel W. Watkins, the subscribing witnesses thereto, the same is adjudged and decreed to be filed and recorded." This decree "is all that appears on the minutes of said court, in reference to said supposed nuncupative will; nor is there anything of record to show such a will, but a paper copied in the book in which wills are recorded," in the following words:

“The nuncupative will of William Kirby, late of the county of Madison, State of Alabama, deceased, made in the time of his last sickness, at his habitation in said county, where he resided the period of — years next preceding the time of making said will. The said William Kirby, during his said last illness, to-wit, on the 28th day December, 1846, and at his said habitation in said county, spoke of his probable death, (which happened two days thereafter, to-wit, on the 30th December, 1846,) and, in that event, of the manner in which he wished his earthly affairs managed. On the day, and under the circumstances stated, the said William Kirby declared, in substance, in the presence of Dr. J. B. Coons and Albert P. Boone, that he wished his business carried on after his death as it had been during his life-time; that he did not wish his wife molested in the possession or enjoyment of his property, or that said property should be scattered, but that he wished his said wife to have all his property. And Joel Watkins, one of the undersigned, was with said William Kirby during his last illness, and at his death, which happened at the time and place before named; and said Kirby called upon him, said Watkins, to take notice that he expressed the same wishes then, in expectation of his death, that he had often before done when in health—which were, that he desired his partnership business with Merriwether A. Lewis to continue during his wife's life as it had during his own life; that he wished all his property to belong to his wife during her natural life, and at her death to go to the children of his said partner, Merriwether A. Lewis; and that he wished no division of his property to take place during the life of his said wife. And said Watkins had frequent conversations with said Kirby, when he was in good health, before his last illness; and in each of said conversations he expressed the same wishes and intentions in the event of his death.” (This writing was signed by said J. B. Coons, A. P. Boone, and Joel Watkins, as witnesses, and was marked “Filed 1st March, 1847.”)

The petition for the revocation of the probate was filed on the 6th July, 1858, and allegèd, that the petitioners were non-residents, and had no notice of the application for the

probate of said nuncupative will; and they insisted that said will, its probate, and all the proceedings connected with it, were null and void. The administratrix appeared, and demurred to the petition, on the grounds—1st, that the petitioners were not entitled to notice of the application for probate; 2d, that the relief which they prayed was barred by the lapse of time, and by the statute of limitations; and, 3d, that the probate was regular and valid, for aught that appeared in the petition. The probate court sustained the demurrer, and dismissed the petition; to which the petitioners excepted, and which they now assign as error.

WALKER & BRICKELL, for appellants.—1. By the ecclesiastical law of England, which, in the absence of express statutory provisions, regulates the practice in our probate courts, there are two modes of proving wills: one in the common form, where the probate is granted without notice to the next of kin; and the other in the solemn form, or form of law, where the parties interested are cited to appear, and have an opportunity to be heard. The latter is conclusive, while the former is liable to be re-examined and annulled, on the application of the parties interested, at any time within thirty years.—1 Jarman on Wills, 215–17; 1 Williams on Executors, 280–2; *Noyes v. Barber*, 4 N. H. 406; *Brown v. Gibson*, 1 Nott & McC. 326; *Gibson v. Lane*, 9 Yerger, 475; *Etheridge v. Corprew*, 3 Jones, (N. C.,) 14; *Bell v. Armstrong*, 2 Eng. Eccl. 135; *Merryweather v. Turner*, 7 Eng. Eccl. 600; *Satterthwaite v. Satterthwaite*, 1 Eng. Eccl. 351. The probate in this case was without notice to the next of kin, who were non-residents; and such probate was authorized by the statute which was of force in 1847. The jurisdiction to grant such probate, involves the jurisdiction to revoke it; and the probate itself can have no other or greater effect than was ascribed to it at common law.—*Conden v. Dobyns*, 5 Sm. & Mar. 62; *King v. Collins*, 21 Ala. 370.

2. The probate should be revoked, because of its insufficiency and uncertainty. The probate court is a court of record, and, although technical formality may not be

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required in its judgments, it is at least essential that they should show the parties, the subject-matter in dispute, and the result.—4 Phil. Ev. (C. & H.) 71, 205. The decree itself does not set out the declarations which were to operate as a will, nor does it purport to give their substance and effect; and it does not furnish the means of identifying the declarations. To constitute a valid probate of a nuncupative will, the record must show a judicial determination of the fact that there was such a will, and must state its provisions.—30 Miss. (1 George,) 418; 25 Miss. (3 Cush.) 530. The paper copied into the record book of wills can not be looked to, to supply the deficiency. *Hudson v. Hudson*, 20 Ala. 364; *Hall v. Hudson*, 20 Ala. 284. If that can be looked to for any purpose, the declarations shown by it are contradictory, and defeat each other.—*Wall v. Wall*, 30 Miss. 91.

3. On the facts stated in the petition, the court should have revoked the probate.—*Lovett v. Chisholm*, 30 Ala. 88; *Roy v. Segrist*, 19 Ala. 810; *Hill v. Hill*, 6 Ala. 166; *Bradley v. Andress*, 27 Ala. 596.

ROBINSON & JONES, *contra*.

BYRD, J.—The mode or form of making probate of *nuncupative* wills is prescribed by statute, and is the only one authorized in our jurisprudence. The effect of our statutes is to require them to be proved in form of law; and therefore proof in common form, as made in the spiritual courts of England, is not allowable in this State, (if it ever were in England,) in the probate of such wills.

2. Under a practice established in this State, by a series of decisions, which, from their long standing, should not now be questioned, it is settled, that any distributee of the estate of a testator, entitled to notice of the probate of the will, and not having received such notice prior to the probate, may make an application to the court in which the will was probated, to vacate and revoke the probate; and that the same should be granted, if it appear that the applicant was entitled to notice and none was given. Thus far our decisions have uniformly gone. In this case, it appears

on the face of the application, that the parties seeking to have the probate vacated were non-residents of the State at the time the will was propounded for probate, and have been such ever since. They were not, therefore, entitled to notice of the probate under the statute in force at the time the will was admitted to probate.—*Shields et al. v. Alston*, 4 Ala. 248; *Clay's Digest*, 303, § 34; *ib.* 597, § 3. Not being entitled to notice, they have no right to call on the court to vacate the probate, on the ground that they did not have notice.—*Roy v. Segrist*, 19 Ala. 810; *Bradley v. Andress*, 27 Ala. 596; *Lovett v. Chisholm*, 30 Ala. 88.

3. Appellants insist, that the order appearing on the record does not amount to a probate of the will. But we cannot assent to this proposition. In our opinion, the order is a sufficient and valid probate of the will, if it be a will.—*Jemison v. Smith*, 37 Ala. 185; *McGrew v. McGrew*, 1 S. & P. 30.

They further contend, that the paper, or evidence of the attesting witnesses, admitted to record, is not a will or valid testamentary disposition of the decedent's estate. Upon this question we express no opinion, as the only question before us, on this record, is the validity of the probate of the supposed will; and not whether the will is valid on its face, or should have been rejected by the court on the hearing of the application for its probate. This question would have been more properly raised on an appeal from the order of the court admitting it to record, and may be, perhaps, hereafter on a distribution or final settlement of the estate.—*Vide Johnson v. Glasscock and Wife*, 2 Ala. 218, which may throw some light on these questions.

Upon applications like the one before us, I am inclined to hold, that every question is closed, except the questions of the interest of the parties making the application, their right to notice of the proceedings to probate the will, whether, being entitled to notice, the same has been given according to law, and the jurisdiction of the court to make probate. If the probate court has jurisdiction of the probate of the will, and there is any other ground for attacking the probate than the want of notice, or the nul-

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lity of the order, then the parties must resort to some other mode of procedure than this, in order to vacate the will or its probate.—2 Ala. R. 218.

In the case of *Hill's Heirs v. Hill's Executor*, (6 Ala. 166,) the court say: "We apprehend it is entirely competent, in the absence of legislation to the contrary, for that (probate) court to set aside the probate of a will which it has allowed without proof, or upon insufficient proof." But the court cite no authority, give no reason, and I know of no authority to sustain such a proposition, unless the court referred to the power of all courts of record to set aside their orders and judgments at and during the term at which they are entered. To do so afterwards, on such grounds as are stated in the passage quoted, would, in my opinion, be violative of all principles applicable to final orders and judgments of courts of record.—2 Black. Com. 24. The probate court is one of that character, and the ecclesiastical courts were not.—2 Black. Com. 67. No other case decided by this court has gone the length of the quotation taken from *Hill's Heirs v. Hill's Executor*, as applicable to a proceeding of this kind. That case was dismissed in this court, on the ground that the appellants were not in a situation to raise any question on the record; and therefore I treat the quotation as mere *obiter dicta*. Upon this branch of the case before us the other members of the court express no opinion.

The application in this case was filed more than ten years after the action of the court upon the probate of the will, and this court has never passed upon the question of the time within such an application as this must be made. And as it is not necessary to the decision of the cause, we will not pass upon it now. A reference to the following authorities and statutes may aid the solution of this question, whenever it arises hereafter.—1 Lomax on Executors, 97-98, § 3; Swinburn on Wills, pt. 6, § 14, pl. 3 and 4; *Satterthwaite v. Satterthwaite*, 3 Phil. R. 1; *Forneau v. Gayfere*, 3 Phil. R. 405; Godol. pt. 1, c. 20, § 4; Clay's Digest, 593, § 15; Code, § 1656; *McArthur v. Carrie's Adm'r*, 32 Ala. 75, and cases there cited.

The judgment of the court below must be affirmed.

NEILSON *vs.* COOK.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Receipt of Confederate money by guardian.*—Under the provisions of the act of the legislature approved on the 9th November, 1861, (Session Acts, 1861, p. 53,) a guardian was authorized, during the war, to receive treasury-notes of the Confederate States in payment of debts due to his ward's estate.
2. *Same.*—The same principles do not apply to a receipt of such treasury-notes by a guardian on the 7th May, 1865, at which time the government *de facto* in Alabama had been overthrown, and the authority of the United States had been re-established; and there being no legal justification for such receipt, the guardian is chargeable on account of it on final settlement.
3. *Exchange of bank-bills for Confederate money.*—A guardian being authorized to exchange one kind of currency for another, and being justified in yielding obedience, during the war, to the government *de facto* which existed in the State, and in dealing in Confederate States treasury-notes, which constituted the common currency of the country at that time; to make him liable on account of an exchange of bank-bills for such treasury-notes, it must be shown that he acted as a prudent man would not have acted in the management of his own affairs, and that his ward's estate was thereby injured; and he is only liable to the extent of that injury.
4. *Liability for hire of slaves.*—The failure of a guardian, in hiring out his ward's slaves, to require a note with sureties from the hirer, being contrary to the general usage, and also violative of section 1751 of the Code, (if that section is applicable to guardians,) he is chargeable with the amount of the hire, on final settlement of his accounts, if it appears that there is danger of loss to the estate on account of the debts; but there is no warrant in the law for decreeing that the guardian "shall stand as security for the debts."
5. *Compensation, and how determined.*—Neither the failure to make annual settlements of his accounts, nor mere negligence which works no injury to the ward's estate, where *mala fides* is not shown, is sufficient to deprive a guardian of the right to compensation; but, where no special or extraordinary services are shown, the court is limited, in making the allowance, to the per-centage specified in the statute, (Code, §§ 1825, 2039,) and can not be governed by the testimony of witnesses as to the value of the services.
6. *Allowance of attorney's fee.*—Held, on the authority of the case of *Anderson v. Anderson*, (37 Ala. 683,) that there was no objection to the allowance of an attorney's fee of one hundred and fifty dollars to the guardian in this case; many of the contested items in his account being decided in his favor.

APPEAL from the Probate Court of Tuskaloosa.

IN the matter of the final settlement of the accounts and vouchers of Chelsea M. Cook, as guardian of John H. Neilson, a person of unsound mind. The letters of guardianship were granted on the 13th December, 1861; and the final settlement was made, after several continuances, on the 8th January, 1866. The ward was represented on the settlement by Mrs. Mary Neilson, his wife, who had made application for letters of guardianship of his person and estate under the authority of a special act of the legislature, and also by attorney. The bill of exceptions purports to set out "all the testimony relating to the matters, opinions, and proceedings of the court, excepted to"; the material portions of which may be thus stated:

1. "Mrs. Neilson requested the court to charge said Cook with the value of eight hundred dollars in bills of the Bank of Mobile," (which he had exchanged for treasury-notes of the Confederate States, as hereinafter stated,) "giving him the benefit of what he received for it; which the court refused to do, and charged him only with the Confederate notes, as stated in his account; to which Mrs. Neilson excepted." The evidence in relation to this item was as follows: "Samuel R. Hamner, a witness for said Cook, stated, that he and John McCollum were the executors of James C. Spencer, deceased, who was the guardian of said John H. Neilson before said Cook; that on their settlement of the accounts of said Spencer as such guardian, with said court, in March, 1862, it was found that, besides negroes, notes, and other property in hand, there was a cash balance due from said Spencer's estate of \$1918.13; and that soon afterwards, in pursuance of the orders of said court, said executors turned over to said Cook, as guardian, the notes and other property on hand, and paid him the said cash balance—that is to say, one thousand dollars thereof in notes on the Bank of Mobile, and the balance in notes on individuals. How many of these notes there were, or who were the makers, or when or how they were paid, or what became of them, was not in proof. Said Cook then read in evidence the deposition of George H. Kirk," whose tes-

timony was in these words : " In the latter part of December, 1862, or the early part of January, 1863, I purchased of C. M. Cook eight hundred dollars in notes of the Bank of Mobile, and five hundred and twenty-five dollars in Selma and Montgomery money, for which I paid him a premium of five hundred dollars in Confederate money, making in all eighteen hundred and twenty-five dollars in Confederate money. The premium I paid him was in excess of the market value in Tuskaloosa. Mr. Cook was trying to dispose of the money for several days, in order to obtain the highest premium for it ; and at the time I purchased it, it was more than he could obtain from any one else in Tuskaloosa. Some days after purchasing from Mr. Cook, I purchased of John McCollum, as administrator of J. C. Spencer, twelve hundred and odd dollars of notes of the Central Bank, at twenty-five per cent. premium. I was acquainted with the value of the Bank of Mobile money, and the money of the other banks in the State ; and the price I paid Mr. Cook was several per cent. higher than the market price in Tuskaloosa. I do not know what that money was worth in Mobile at that time ; but I sold the same money in Selma, about three weeks afterwards, at sixty per cent. premium for the Mobile money, and thirty-five per cent. premium for the Selma and Montgomery money."

"Dr. Robert Neilson, a witness introduced by said Cook, testified that, from 1862, until the surrender, Confederate money was the common currency of the country ; that the Mobile banks suspended specie payments, to the best of his recollection, in the winter of 1862-3,—it might have been in 1861-2 ; that their bills continued good for a long time after their suspension ; that there was no time during the war, when their notes were worth less than half as much as gold ; that at one time he knew of nine dollars in Confederate money being given for one dollar in Mobile money, and at another time ten for one, but could not remember when." "Thomas Maxwell, introduced by Mrs. Neilson, testified that, in August, 1862, he returned from Europe, and bought Confederate treasury-notes at the rate of ten dollars for a sovereign ; that Mobile bank-notes, in the lat-

ter part of 1863, rated with gold at fifty cents on the dollar ; that this comparative value continued till within two or three weeks of the surrender, when he bought European exchange from the Bank of Mobile, rating its notes in that way. Mr. Maxwell further said, in answer to questions by said Cook, that the value of Mobile money was not known to the public, and he concealed it ; that he bought it to make money, and did not pay its real value ; that he knew of said Cook's offering for several days eight hundred dollars about the time he sold that sum to Kirk ; that he tried to buy it from Cook, but offered him less than Kirk gave ; that he was anxious to buy, knowing its value, but would not give as much as Kirk gave, which was more than the market price in Tuscaloosa."

2. "Mrs. Neilson requested the court to charge said Cook with the value of the note on John S. McCollum, and interest thereon, giving him the benefit of what he received ; which the court refused to do, and charged him only with the Confederate notes, as stated in the account ; to which Mrs. Neilson excepted." This note was for \$1717.39, was dated the 14th August, 1860, and was proved to have been given for the price of land. On the 18th February, 1863, Cook collected \$365.69 interest on it, in Confederate treasury-notes, and on the 9th March, 1865, the entire amount due on it (\$2015.66), also in Confederate money ; and he was charged in his account, as stated by the court, with both these sums. "It was admitted that, in June, 1863, McCollum spoke to Cook about paying his note in Confederate money, and that Cook told him he would not receive it ; that again, not long afterwards, he brought the Confederate money to Cook to pay the note, and Cook again refused to receive it, because, as he said, he did not then need the money." Dr. Marrast, a witness introduced by Mrs. Neilson, testified, "that Confederate money was the common currency of the country during the war, and was received and paid out in current trades, and generally for debts created while it was in use ; that so far as he knew or believed, it was not received in payment of debts created before the war, either in 1864 or 1865 ; that he offered to pay interest on an old debt, in 1864, in Confederate money,

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and it was refused." "Dr. Robert Neilson, being recalled at the instance of Mrs. Neilson, testified that, in March, 1865, in Tuskaloosa, Confederate treasury-notes rated at about sixty to one for specie." "T. F. Samuel, being recalled at the instance of said Cook, stated, that he, as sheriff of the county, received and paid out Confederate money, and no other, during his term; that he collected a good deal in 1864, but not much in 1865; and that he recollected one case—a State case—in which he received a fine at the March court, 1865." G. W. Jennings, introduced by said Cook, testified, "that he was the general administrator of the county, and had received and paid out Confederate money,—none, however, in 1865, and very little in 1864; that he paid to a firm in Mobile, some time in 1864, as administrator, six hundred dollars in Confederate money, on a debt due before the war; that said Cook, as his attorney, collected some in 1864, and paid it to him, but he did not recollect at what time; and that he thought he would have received it, if the debtor had brought it to him."

3. "Mrs. Neilson also requested the court to charge said Cook with the value of the note on D. A. Mitchell, (which was given for the hire of Lewis in 1862, and which said Cook collected on the 7th May, 1865, in Confederate notes,) allowing him what he collected; which the court refused to do, and charged him only with the Confederate notes, as stated in the account; to which Mrs. Neilson excepted." This item is entered in the account-current in these words; "May 7, 1865. To cash from D. A. Mitchell, hire of Lewis 1862, and interest, \$103.25." Another item on the debit side of the account is, "Cash received from D. A. Mitchell, hire of Lewis, 1863, \$100", and is dated January 1, 1864. "T. F. Samuel, a witness for said Cook, stated that, at some time not now remembered, he met said Cook and D. A. Mitchell on the street; that they told him Cook had a note on Mitchell for over one hundred dollars, which was not produced; that, by agreement between them, Mitchell gave him one hundred and five dollars, in Confederate money, to pay the note when produced; that he paid the note about a week afterwards, and that the money was current at that time."

4. "Mrs. Neilson requested the court to charge said Cook with the value of the hire of the negro woman Edith, hired to Miss Harriet Barringer, for the year 1865, and also with the value of the hire of the negro hired to R. F. Knott for the year 1864; which the court refused to do, but, in the decree, ordered that said Cook should stand as security for said hire; to which refusal to charge him as requested Mrs. Neilson excepted." The bill of exceptions states that, "during the examination of his account, said Cook stated to the court that, on the 1st January, 1865, he had hired negroes to parties who refused to give their notes for the hire, but were willing to pay in currency at the time, and that he accepted the payment, and now asked the instructions of the court as to what and how he should charge himself on that account; and the court thereupon directed him to charge himself with the amount at that date, which he did, as shown in the account stated." In reference to these two items for the hire of negroes, the decree of the court is in these words: "Among the list of notes, &c., presented by said Cook as guardian, there is a note on R. F. Knott for three hundred dollars, dated January 2, 1864, and due the 1st January, 1865, given for negro hire for the year 1864; also, an account against Harriet Barringer for two hundred and fifty dollars, for the hire of the woman Edith for the year 1865; for which said note and account there is no security. Thereupon, it is ordered by the court, that said C. M. Cook be held liable as security for the said claims, or evidences of debt." The deposition of Harriet Barringer was taken by Mrs. Neilson, and was as follows: "About the 1st January, 1865, C. M. Cook, as guardian of John H. Neilson, hired a negro woman to me for the year 1865, at two hundred and fifty dollars, clothing, and taxes. I offered, either to pay him in advance, or to give him my note. He said that he preferred my note. This was on Saturday, the day before New-Year's-day. I had my pocket-book with me, with the Confederate money, and was ready to pay in advance when I made the offer. I was induced to make the offer, because when I applied to him for Edie, about a week before, he told me he had been taking pay in advance, and I preferred to pay in advance,

and told him so. I have never given my note. It was not applied for until after we had all heard of General Taylor's surrender. I then renewed the offer to pay in Confederate notes, but Mr. Cook said he would not take them." There was no evidence in reference to Knott's note, except the facts stated in the decree.

5. "Mrs. Neilson also objected to the allowance made by the court to said Cook, for his services as guardian, and to the amount thereof, and reserved exceptions to the overruling of her several objections." The compensation allowed to the guardian was—for the first year, ending December 13, 1862, three hundred and fifty dollars; for the second year, the same sum; for the third year, two hundred and fifty dollars; for the fourth year, up to April, 1865, sixty-six 66-100 dollars,—in all amounting to eleven hundred and sixty-six 66-100 dollars. On the question of compensation, "it was shown to the court, on the part of Mrs. Neilson, by the files of the court, that no inventory of the effects of said estate which had come into his hands, was filed by said Cook until to-day; that no report or account of his doings was ever filed until to-day; that he resigned the guardianship about the 20th April last, and asked the court to appoint a day for the settlement of his accounts; that the 11th day of May was first appointed for this purpose, but the settlement was then continued, at the instance of Mrs. Neilson. It was admitted that, from that time until the present, with the exception of a brief interval, said Cook was desirous of a settlement; but it was prevented by the state of the country, and other circumstances. It was admitted, also, that W. Moody, counsel for Mrs. Neilson, went to the office of the probate judge, about the 1st May, 1865, for the accounts and other papers in the cause; that, not finding them there, he went to Mr. Cook's office, and was told by Mr. Cook that he was making out the papers, and would hand them to him; that said Cook did hand to said Moody, some days afterwards, the inventory, reports of the hiring of negroes, and accounts purporting to be accounts for settlement in 1863 and 1864, which are herein copied; and that these papers remained in the hands of said Moody and Mrs. Neilson, until about

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the 30th December, 1865, when they were returned to said Cook, at his request."

"Robert Neilson, a son of said John H. Neilson, a youth about nineteen years old, who was introduced as a witness on the part of Mrs. Neilson, testified, that there were eight negroes belonging to the estate, six men and two women; that the negroes came to his mother's house every Christmas, and remained there until they were hired out; that when persons who wished to hire came to his mother's, she sent them to Mr. Cook, who perfected the contracts, and took their notes; that Mr. Cook, so far as he knew, did nothing but hire out the negroes in this manner, and receive and pay out money; that said Cook bought a horse and saddle for witness; that Mr. Spencer, the former guardian, used to come to the house, and inquire about the wants of the family, and purchase their family supplies; that Mr. Cook bought nothing for the family; that the estate owned a tract of land in North Mississippi, which Mr. Spencer made two trips to look after, but Mr. Cook made none; that Cook wrote one letter to the agent there, who was appointed by Mr. Spencer. Said witness stated, on cross-examination, that Mr. Cook might have done many things that he did not know of; and reference was made to some items in the accounts, which he said he did not know anything about."

"T. F. Samuel, when recalled, was asked what the services of said Cook, as guardian, were worth; and answered, he supposed between three and four hundred dollars. Being told that the money received and paid out was mostly Confederate money, he said that would make a difference. G. W. Jennings, being asked what Mr. Cook's services were worth by the year, said, that he supposed they were worth between three and four hundred dollars; but that, if Mr. Cook had not done his duty, they would be worth less, say two hundred dollars. Neither Samuel nor Jennings heard the testimony as to Mr. Cook's services; but the accounts filed, the list of the notes filed, and the reports of hiring, were laid before them, and the prominent portions of the testimony were stated to them by counsel. Mrs. Neilson objected to the court's receiving testimony as to the value

of said Cook's services, and reserved an exception to the overruling of her objections."

6. "Mrs. Neilson objected, also, to the allowance made for counsel fees, and to the amount thereof; and her objection being overruled, she excepted." The allowance made for counsel fees was one hundred and fifty dollars. The only evidence in relation to this allowance is the testimony of J. M. Van Hoose and J. M. Martin, esquires, who were introduced as witnesses on the part of Cook. Van Hoose stated, "that an attorney's fee in this case was worth about two hundred dollars"; and Martin, "that, in this case, and in matters of litigation of this kind, the attorney's fee would be worth not less than two hundred dollars."

The several rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

W. MOODY, for appellant.—In the management of the funds committed to his charge, a guardian must look only to the interests of his ward. He has no right to be benevolent, or charitable, or patriotic, at his ward's expense. He can do no act, whatever may be his motive, to the injury of his ward. He is required to act with reasonable diligence, and to be vigilant in the discharge of his duties; and in matters of discretion, he must act as a prudent man would act in regard to his own affairs. He has no right to mingle the trust funds with his own, nor to speculate with them, nor to buy stock, notes, bills of exchange, uncurrent money, or any kind of property; and if he does any of these things, he is responsible for the consequences, at the election of his ward. These general principles are sustained by the following authorities: *Jackson v. Sears*, 10 John. 434; *Montgomery v. Givhan*, 24 Ala. 584; *Harrison v. Mock*, 10 Ala. 185; *Cunningham's Adm'r v. Rogers*, 14 Ala. 149; *Blackwell's Adm'r v. Blackwell's Distributees*, 33 Ala. 61; *Kavanaugh v. Thompson*, 16 Ala. 826; *Lawson's Adm'r v. Lay's Executor*, 24 Ala. 187; *Tompkies v. Reynolds*, 17 Ala. 109; *Kyle v. Barnett*, 17 Ala. 306; *Hudson v. Helms' Ex'r*, 23 Ala. 585; *Royall's Adm'r v. McKenzie*, 25 Ala. 363-70. These principles are founded in the general policy of the

law, and preclude inquiry into the circumstances of each particular case.

1. Tested by these general principles, the guardian ought to have been charged with the amount of the notes on the Bank of Mobile, which he sold for Confederate money. This bank continued to pay specie for its notes long after the war began, and kept them at par long after it had suspended, by selling its European exchange for them. Its notes were always the best currency in the country, and always approximated a specie standard. These facts, so peculiar, so remarkable, so generally known, would be judicially noticed by the court, even if there was no positive proof of them. If the bank-notes sold to Kirk were the identical notes received from Spencer's administrators, (of which fact, if it be a fact, there is no proof,) the guardian was not authorized to make the exchange, unless some imperative necessity required it. No such necessity was shown; on the contrary, the account, as stated by the guardian himself, and other positive evidence in the case, shows that there was no necessity for the exchange—that the guardian had no need of Confederate money at that time, and that the exchange was a mere speculation on his part. Even if a necessity for the exchange had been shown, the guardian rendered himself liable for the consequences of the act, by mingling his own funds with the trust funds. The exchange of the Mobile, Montgomery, and Selma bank-bills, was one indivisible transaction, and there is no proof that the Selma and Montgomery bills belonged to his ward's estate.

2. McCollum's note was given before the war, for the price of land; and it was as good a note as could be made. It was paid in Confederate money, at par, on the 9th March, 1865, just one month before General Lee's surrender. No prudent man would have received payment under the circumstances. The testimony shows, that, in March, 1865, Confederate notes rated at sixty to one for specie, in Tuskaloosa; that they were not received in payment of old debts, and were only taken where the claim was considered desperate. The act of November 9, 1861, under which the receipt of this money is sought to be

justified, did not compel guardians, nor make it their duty, to receive Confederate money in payment of debts. If it had attempted to do so, it would have been violative of the tenth section of the first article of the constitution of the United States, which declares, that no State "shall make anything but gold and silver coin a tender in payment of debts, nor pass any law impairing the obligation of contracts." It simply allowed him to exercise a sound discretion in the receipt of such funds, and left his liabilities to be determined as before. The court must judicially know, too, that, at the time this act was passed, Confederate notes were at par—in fact, were the best currency in the country, and that they became greatly depreciated before this payment was made.

3. At the time Mitchell's note was given, bank-notes were the principal currency of the country, and were only a little below par as compared with specie. It was paid in Confederate money, at par, on the 7th May, 1865; which was three days after Taylor's surrender, eleven days after Johnson's surrender, and nearly a month after Lee's surrender. No principle of law can sanction the receipt.

4. The guardian should have been charged with the amount of the hire due from Knott and Harriet Barringer. In failing to require security, he violated the universal usage of the country, if no positive statute. Miss Barringer testifies, that she offered to pay in advance; and the guardian should have received the money, and appropriated it to the benefit of the ward's estate. The order that the guardian should stand as security for these sums, practically amounts to nothing, for there is no process by which it can be enforced.

5. To determine the guardian's right to compensation, regard must be had to the condition of the estate when he received it, its condition when he gave it up, the nature of his services while he had charge of it, and their effect on the estate. When the estate went into his hands, it owned a large amount of good notes, nearly two thousand dollars in cash, and eight negroes, good field-hands, besides a tract of land, and it owed nothing. When he gave it up, it owed over two thousand dollars, and had nothing of value left,

except the land, with which he had nothing to do. The family was supported, meanwhile, by Mrs. Neilson's personal exertions, and out of her separate estate; and she received from the guardian, during the four years, only about four hundred dollars. No special or extraordinary services on the part of the guardian were shown; his principal acts consisted in the receipt of worthless money, and resulted in palpable injury to the estate. By his bad management, there has been a loss to the estate of at least eight thousand dollars in good money. If he was entitled to extra compensation for these services, ought it not to have been allowed out of the worthless funds on hand?

6. The court erred in allowing an attorney's fee.—*Anderson v. Anderson*, 37 Ala. 683.

S. A. M. WOOD, *contra*, and C. M. COOK, *pro se*.—1. The exchange of the bank-notes was within the general authority of the guardian, and was required by the necessities of the estate. Moreover, the bank-notes were sold for more than their market value, and no injury resulted to the estate.—1 Vesey, 193; 2 Johns. Ch. 26, 28; 2 Stew. & Port. 376; 15 Ala. 333; 4 Johns. Ch. 629; 18 Ala. 27.

2. The receipt of Confederate treasury-notes by the guardian, was authorized by law.—Session Acts, 1861, p. 53. The act of the guardian has been ratified by the State convention, and by the legislature.—Ordinance No. 26, adopted September 28, 1865; Session Acts, 1865-6, p. 115. As the notes were collected and paid out in the same currency, no injury to the estate could have resulted.—*Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

3. There is no statute in the State which made it obligatory on the guardian to take a note with sureties for the hire of the slaves. If it were his duty to do so, he could not be charged with the amount of the hire, except on proof of loss to the estate; which is not shown.—*Powell v. Powell*, 10 Ala. 900; *Craig v. McGehee & Armstrong*, 16 Ala. 41.

4. Only gross negligence, or willful default, resulting in loss to the estate, can deprive a guardian of the right to compensation.—*Darrington v. Darrington*, 32 Ala. 227; 31 Ala. 207; *Gould v. Hayes*, 19 Ala. 438; 14 Ala. 302;

10 Ala. 900 ; 7 Ala. 617 ; 9 Porter, 667. The mere failure to make annual returns, is not such negligence.—16 Ala. 41. The guardian had no authority over the land in Mississippi, and the probate court could confer none on him.—13 Ala. 329 ; 22 Ala. 396.

5. The allowance of the attorney's fee was proper.—24 Ala. 259 ; 24 Ala. 295.

A. J. WALKER, C. J.—The assignments of error present for revision the rulings of the court to which exceptions were taken. They are as follows: 1st, the refusal to charge the guardian, "giving him the benefit of what he received", with the value of a note on John S. McCollum, given in August, 1860, which was collected in Confederate treasury-notes, on the 9th March, 1865 ; 2d, a like refusal to charge as to the value of the note on D. A. Mitchell, which was collected on 7th May, 1865, in Confederate treasury-notes ; 3d, the refusal to charge the guardian with the value of eight hundred dollars in bills of the Bank of Mobile, which were exchanged in January, 1863, at a premium, for Confederate treasury-notes ; 4th, the refusal to charge the guardian with the value of a note on R. F. Knott, given for the hire of a slave in January, 1864, upon which there was no security ; and with the value of an account on Mrs. Barringer, for the hire of a slave for the year 1865, for which neither note nor security was taken ; and, 5th, the allowance of compensation and an attorney's fee.

1. We decide the question arising on the first of the above stated exceptions, in favor of the guardian, on the authority of *Watson and Wife v. Stone*, decided at the present term.

2. The note on D. A. Mitchell was collected in Confederate treasury-notes, after the surrender of the forces of the *de facto* government, and the establishment of the authority of the United States in Alabama. For this act there is no *legal* justification, and the guardian is chargeable, as proposed, by the appellant. He is, in fact, charged in the account with the amount of the note as money ; and as the account now stands, the result is the same as if a collection in par funds had been acknowledged ; but if, on stating a

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future account, a balance should be ascertained against the guardian, the ruling now made, that the guardian had no legal right to collect the note in Confederate treasury-notes, may become important.

3. The refusal of the court to charge as requested in reference to the exchange, in January, 1863, of bills of the Bank of Mobile for Confederate treasury-notes, presents a different question. This transaction was not the payment of a debt, but an exchange. It is not authorized by the act of 9th November, 1861; for that act extends to payment in Confederate treasury-notes, and not to exchange for them. The liability on account of this transaction cannot be tested by the principles which govern as to the first point decided. There was nothing in the subsisting political *status* during the war, as between individuals, which forbade the use of Confederate money. The government being for the time without the sovereignty of the United States, individuals are excusable for yielding to the authority of the *de facto* government over them, and recognizing its attitude and position in reference to the United States. This is not only consonant with the principles of international law, but there was a long time during which the dealing in Confederate treasury-notes was an unavoidable necessity, for it was the only currency, and neither food, clothes, nor shelter could otherwise be procured. Guardians are allowed to make exchanges of one currency for another, when a prudent man, in the conduct of his own affairs, would have done so. The test, therefore, of the guardian's liability here is, whether he has acted as a prudent man, in the management of his own affairs, would not have acted, and whether the interest of his ward has been thereby prejudiced. If he did so, he should be held liable to the extent of the injury sustained.

The appellant did not adopt this principle in the charge which she sought to impose upon the guardian. She asked the court to charge the guardian with the eight hundred dollars in the bills of the Mobile bank, "giving him the benefit of what he received for them." If, by this phrase, "giving him the benefit of what he received for them", be meant allowing him a credit for the value of the treasury-

notes, as compared with the bank-bills, no charge could be predicated of the transaction; because the proof shows that he received more than the market value of the bank-bills. But, if it meant that he should be charged with the bank-bills, and credited with the present value of the treasury-notes, the proposition is shocking to the sense of justice. These treasury-notes may have been, and the record conduces to show were, appropriated to the benefit of the ward's estate. There is no evidence that the estate sustained any detriment whatever by the exchange which was excepted to, so far as we can perceive; and we cannot affirm that there was any error in the ruling of the court. We are not to presume either injury to the estate, or *mala fides* in the guardian.

4. The failure to require security on the note of Mr. Knott, and to take a note with security from Mrs. Barringer, for the hire of slaves, was inconsistent with the prevalent usage in the State, and in express violation of section 1751 of the Code, if applicable to guardians. At all events, we think the guardian has, by his failure in the particulars above stated, placed the debts in such a condition of insecurity as to justify charging him on account of it, if the appellant so elects. There is no warrant in the law for the decree, that the guardian should stand as security for the debts.

5. Neither a failure to file annual accounts, nor negligence which works no injury, where there is no *mala fides*, can deprive a guardian of his compensation.—*Powell v. Powell*, 10 Ala. 900; *Craig v. McGehee & Armstrong*, 16 Ala. 41. We do not find in this case, as now presented to us, the facts necessary to justify a denial of compensation to the guardian; but the court below committed an error in determining the compensation by examining witnesses as to the value of the services. No special or extraordinary services appear to have been rendered. This being the case, the guardian could not be entitled to more than the commissions specified in section 1825 of the Code, which is made applicable, by section 2039, to guardians; and the commissions authorized by the second section of the act of 7th December, 1861, (Pamphlet Acts, 1861, p. 52,) and the

court is not bound to allow so much, if, in his opinion, it is unreasonable.—*Allen v. Martin*, 36 Ala. 330, and cases there cited.

The testimony as to the value of the guardian's services may have been admissible, for the purpose of advising the judge as to whether he should allow as much as two and one half per cent., but not for the purpose of fixing the compensation.

6. We perceive no objection to the allowance of the attorney's fee.—*Anderson v. Anderson*, 37 Ala. 683.

Reversed and remanded.

BYRD, J., not sitting.

GARRISON vs. BURDEN.

[ACTION TO RECOVER DAMAGES FOR SEDUCTION OF PLAINTIFF'S WIFE.]

1. *Abatement of action by death.*—An action to recover damages for the seduction of the plaintiff's wife, is within the exception as to actions "for injuries to the person," which do not survive, (Code, § 2157,) and abates by the death of the defendant.
2. *Re-enactment of statute with judicial construction.*—The substantial re-enactment in the Code, of a statute which had been judicially construed, must be taken as a legislative adoption of that construction.
3. *Void judgment vacated at subsequent term.*—An order reviving an action which has abated, and which can not be revived, is void for want of jurisdiction, and may be set aside at a subsequent term.
4. *Judgment for costs on abatement.*—On the abatement of an action by the death of the defendant, where no revivor is allowed by statute, judgment for costs can not be rendered against the plaintiff, for the use of the officers of court and witnesses: section 2389 of the Code applies only to cases in which there is a failure to revive through negligence.
5. *When appeal lies.*—A judgment for costs against the plaintiff, for the use of the officers of court and witnesses, where the suit has abated by the death of the defendant, being a nullity, will not support an appeal.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. S. C. POSEY.

THIS action was brought by Redding Garrison, against Andrew Burden, to recover damages for the seduction of the plaintiff's wife; and was commenced by original attachment, which was sued out on the 13th May, 1861. At the fall term, 1863, the defendant's death was suggested; and the cause was ordered to be revived against his personal representative, when made known. At the spring term, 1864, as the minute-entry states, "the defendant, by his attorneys, moved the court to dismiss the suit, on the ground that the defendant had died before the last term of the court"; but the court overruled the motion. The motion was renewed at the next term, and was continued; and at the March term, 1866, the court rendered judgment on the motion, that the said order of revivor "be set aside, and that the said action do abate; and that the defendant, for the use of the officers of court and witnesses, recover of the plaintiff all the costs by him created about this suit, in this behalf expended." This judgment, to which the plaintiff excepted, and each separate part thereof, are now assigned as error.

THOS. M. PETERS, for appellant.—1. The constitution secures to every one a remedy by due course of law, "for any injury done him in his lands, goods, person, or reputation"; thus, in effect, taking away from the legislature and the courts the power to destroy his remedy, by abatement, dismissal, or otherwise, where he is not in fault.

2. Whatever may have been the rule of the common law as to the abatement of personal actions by death, a new rule was introduced by the Code, which was intended to remedy the hardship and injustice of the common law. This statute should be so construed as to aid the manifest intention of the legislature, and confine the injustice to its narrowest limits.—Broom's Maxims, m. pp. 400-02; *Sproul v. Lawrence*, 33 Ala. 674. The exception in the statute, as to actions "for injuries to the person," means direct physical injuries or hurts to the body, and not mere injuries to

the feelings ; injuries which must be redressed by an action of trespass *vi et armis*, and not by an action on the case. *Commonwealth v. Cooley*, 10 Pick. 37 ; *Bartlett v. Morris*, 9 Porter, 266 ; *Troup v. Smith*, 20 John. 44 ; *Smith v. Sherman*, 4 Cushing, 408 ; 2 Kent's Com. 75-8 ; 4 McLean, 599 ; 1 W. Saunders, 216, note ; 21 Pick. 250 ; 4 Dev. & Batt. 146 ; 2 Greenl. R. 294 ; 8 Mass. 430 ; 1 Blackf. 36 ; 4 Wheat. 207.

4. The judgment for costs is undoubtedly erroneous.—24 Ala. 418 ; 22 Ala. 673, 772 ; 19 Ala. 198, 268 ; 17 Ala. 653.

CHITWOOD, HANSELL & CLARK, *contra*.—1. All personal actions abated by the death of the defendant, at common law. By statute in this State, some personal actions are excepted from the operation of this rule ; but an action for *crim. con.* is not within the statute.—Clay's Digest, 314, § 6 ; Code, § 2157 ; *Cox's Adm'r v. Whitfield*, 18 Ala. 739.

2. The judgment for costs was authorized by section 2389 of the Code. If erroneous, however, the cause will not be remanded on account of it.—*Cox's Adm'r v. Whitfield*, 18 Ala. 739.

JUDGE, J.—The common-law maxim is, that personal actions die with the person. But this maxim has been modified, both in England and in this State, by statutory enactments. Section 2157 of the Code is as follows : "All actions on contracts, express or implied, all personal actions, except for injuries to the person or reputation, survive in favor of and against the personal representatives." And such, in effect, was the statute law of this State prior to the adoption of the Code, with the exception, that the right to revive, under the prior law, was given only to the executor or administrator of the *plaintiff*.—Clay's Digest, 314, § 6 ; *Coker v. Crozier*, 5 Ala. 369.

Is adultery, or criminal conversation with the wife, in legal contemplation, an injury to the person of the husband ? Blackstone and Chitty both declare that it is, and that the law gives a satisfaction to the husband for it, by an action of trespass *vi et armis* against the adulterer ; and upon this point we are not aware that there is any conflict of authority.—4 Black. Com. 139-40 ; 1 Chitty's Pleadings, 168. See, also, *Cox's Adm'r v. Whitfield*, 18 Ala. 738.

We can not concur with the counsel for the appellant, in the position, that the words, "injuries to the person," within the meaning of section 2157 of the Code, are "direct physical hurts to the body of the person, and not mere injuries to his feelings unaccompanied by bodily hurt." These words, in the connection in which they are used in the Code, are of technical import; and "words which have obtained a fixed and definite meaning at common law, in reference to a particular subject, are presumed to be used in a statute, relating to the same subject, in their common-law sense." *Ex parte Vincent*, 26 Ala. 145. Furthermore, before the adoption of the Code, the prior statute, cited from Clay's Digest, in so far as relates to the present question, had been in effect construed by this court, in the case of *Cox's Adm'r v. Whitfield*, *supra*. In that case, which was an action of *crim. con.*, the judgment recovered against the defendant in the court below was reversed; but, the defendant having died pending the writ of error, the court refused to remand the cause, on the ground that the action had abated by reason of the death of the defendant. The legislature, in substantially re-enacting the provisions of the prior law, which had thus been construed, must be presumed to have had knowledge of, and to have adopted, that construction. *Shepherd's Digest*, 745, § 29.

3. When the defendant died, the action stood abated. It was, in legal effect, out of court; and the order reviving it in the name of the representative of the deceased defendant, when known, was void for the want of jurisdiction in the court to make it. The order being void, no error was committed by the court in vacating it at a subsequent term.—*Jones' Adm'r v. Brooks*, 30 Ala. 588.

4. But the court had no authority, after declaring the suit abated, to render a judgment against the plaintiff for costs. As a general rule, a judgment for costs can not be rendered in favor of any one, but a party to the suit.—*Patterson v. The officers, &c.*, 11 Ala. 740; *Griffin v. Smith*, 14 Ala. 571; *Scott v. John*, 15 Ala. 566; *Jones' Adm'r v. Brooks*, *supra*. The defendant was dead, and the officers of court, and witnesses in the cause, were not parties to the suit; and there

was no party in court in favor of whom such a judgment could have been rendered.

The exception to the rule stated above, created by section 2389 of the Code, had no application to the case. That section is as follows: "When a plaintiff brings a suit, which he suffers to abate by the death of the defendant, or other cause; or where the suit abates by the death of the plaintiff, and his representatives fail to revive the same, judgment for costs may be rendered against such representatives, in the name of the officers of the court, and are paid as other claims against such estate." If, under the peculiar phraseology of this section, a judgment for costs can, in any case, be rendered "in the name of the officers of the court," against any other party than the "*representatives*" of a deceased plaintiff; still, we are of the opinion, that the section was intended to apply only to cases in which the cause of action survives, and in which the action is "*suffered*" to abate by the failure of the proper party to revive it.

As the judgment for costs was a nullity, no execution could issue upon it; and if one should issue, it would be superseded and quashed.—*Patterson v. The officers, &c., supra.* The officers of court, and witnesses in the cause, who may be entitled to costs, have recourse against the party at whose instance they rendered services.—*Jones' Adm'r v. Brooks, supra.*

5. The judgment rendered in this cause, will not support an appeal.—*Patterson v. The officers, &c., supra.* If there had been error in the refusal of the court below to permit the action to be revived, the writ of *mandamus* would have been the appropriate remedy.—*The State, ex rel. Nabors' Heirs, 7 Ala. 459.* And the judgment for costs is not only a nullity, but there is no adverse party to the appellant therein, against whom an appeal could be prosecuted; Burden being dead, and no officer of court, or witness, being named as a party in the judgment.

Appeal dismissed, at the cost of the appellant.

DENT vs. SLOUGH.

[BILL IN EQUITY BY WIFE, AGAINST SURVIVING PARTNER OF DECEASED HUSBAND, FOR DISCOVERY AND ACCOUNT.]

1. *Liability of husband for profits of wife's separate estate.*—The husband is not liable for the profits of the wife's statutory separate estate (Code, § 1983,) although he has used both the income and *corpus* of the property in partnership business with another person.
2. *Termination of trust by death of husband.*—On the death of the husband, the wife's statutory separate estate is discharged of the trust, and the legal title vests absolutely in her; consequently, she may sue at law for its recovery, and cannot sue in equity without showing some independent ground of equitable relief.
3. *Investment by husband of wife's trust funds in mercantile partnership.*—If the husband invests moneys belonging to the wife's statutory separate estate in a mercantile partnership, his wife's claim against his estate, after his death, is that of a general creditor merely, and cannot be enforced as a trust against the partnership business; nor can she maintain a bill in equity against the surviving partner, for an account of the profits realized after the death of the husband.
4. *Discovery and account; when bill lies by wife.*—Although the husband is not accountable to the wife for the profits realized from a mercantile partnership, in which he had invested moneys belonging to her statutory separate estate; and although she cannot maintain a bill in equity against his surviving partner, for an account of the profits realized by the partnership business, after the death of the husband; yet her bill may be maintained as an ordinary bill for discovery and account, if it contains the necessary allegations as to the complication of the accounts, and the necessity of a discovery from the books of the partnership.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

THE bill in this case was filed, on the 30th January, 1866, by Mrs. Fanny Dent, the widow of Dennis Dent, deceased, against Robert H. Slough. Its material allegations, with the corresponding numbers of the paragraphs of the bill, are the following: 1. The complainant and said Dennis Dent were married in December, 1855; and the complainant then owned, or was entitled to, a separate estate, under

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the laws of Alabama. 2. About two years after said marriage, Dennis Dent formed a partnership with the defendant, and carried on, with him, in the city of Mobile, the business of factors and commission-merchants, under the firm name of Slough, Dent & Co., until the death of said Dennis Dent, which occurred on the 20th August, 1863. 3. During the existence of said partnership, the complainant's brothers paid to her said husband, at various times, moneys belonging to her said separate estate, amounting in the aggregate to \$12,402.86, "which was at once passed into the books of said partnership, and was used and employed by said firm, with a full knowledge, on the part of both partners, that said moneys belonged to the complainant's separate estate as aforesaid. "The said firm, as complainant is informed, believes, and charges, opened an account with her, crediting her with the moneys thus received, and charging her with disbursements made on her account; which account ran through five or six years, or more, and is a complicated trust account. No notice or information of such employment of her money was given to complainant, and no statement whatever of her account has been rendered to her. She has been informed, and believes that, at the time said partnership was dissolved by the death of her husband, the books of the firm showed a large balance in her favor, not less than six or seven thousand dollars, besides interest; and she charges such to be the fact." 4. On the dissolution of the partnership, its available assets were more than sufficient to pay all its debts and liabilities. 5. The defendant "has never settled up said partnership business, and has taken no steps toward such settlement; on the contrary, he has gone on and employed the partnership assets, and the funds so held in trust for complainant, as though no dissolution had taken place; has used its assets, and said trust funds, in conducting new enterprises, speculations, and business, just as if they were his exclusive property, and is now using the same in the cotton factorage and commission business, and in various speculations, carried on under the style of R. H. Slough & Co., in which he is the sole person interested." 6. At the time of the dissolution of the firm of Slough,

Dent & Co., said Slough had no other means of his own than such as he had invested in said partnership.

7. "During the late war, said R. H. Slough was largely engaged in blockade running, cotton, and other speculations; and, as complainant is informed and believes, and therefore charges, so used the assets of said firm, and the said trust funds of complainant, and made large sums of money from the use of said assets and funds, and now claims that the same belongs to him solely; and he has so commingled the proceeds and acquisitions from those sources, with the present business done under the name of R. H. Slough & Co., that the same cannot be separated therefrom, except upon a discovery and disclosure from said Slough." 8. "Said Slough, as complainant is informed and believes, and therefore charges, has no property that is visible, or out of which any decree that may be rendered in favor of the complainant, can be satisfied, by any ordinary execution of the court; but, in order to defraud complainant, has converted her said trust funds, and all his other means, into, and now has derivable therefrom, equitable interests, property, money, or things in action, which complainant has been unable to discover; and she is fearful that he will make way with, or place the same beyond the control of this court. Complainant has reason to believe, and therefore charges, that said Slough used her said separate-estate money to acquire, and now holds, derived from this source in whole or in part, some real estate, or chattels real, in possession, reversion, or remainder, or some interest therein; or some personal property, of some nature or kind, consisting of money, plate, jewelry, furniture, goods, wares, merchandize, cotton, ships, steamboats, stocks, public or private, in some government funds, insurance company, or some other company or companies, chartered or unchartered, or some interest therein; or some evidences of debt, or things in action, in his own possession, power, or custody, consisting of bank-notes, treasury-notes, or notes of some kind intended to pass as money, book-accounts, due-bills, drafts, checks, promissory notes, bills of exchange, certificates of deposit, policies of insurance, bonds, leases, mortgages, judgments, or other securi-

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ties, or some interest therein ; or that Slough is interested, as a partner or otherwise, through complainant's said funds, with some other person or persons, company or companies, unknown to complainant, who hold some real or personal property, or some interest therein, or something in action, in trust, or under some colorable title, for the benefit of said Slough, or of his family, in possession, reversion, or remainder, proceeding from the said Slough, or from some deed or instrument creating a trust in his favor. All which matters and things complainant is ignorant of, and prays a full disclosure as to them from said Slough ; and she believes and charges, that said moneys, property, and things in action so possessed by said Slough, or held in trust for him, or his interest therein, is of value sufficient, and more than sufficient, to make good and satisfy the moneys of complainant, so used and appropriated by said Slough, in the acquisition of such equitable rights, interests, and property, if, upon such discovery, she should not elect to adopt the investments." 9. "Complainant has no means of establishing a full and correct account of the amount of her separate estate, received and used by said firm as aforesaid, except through the books of said firm, and through and by a disclosure from said defendant ; nor of the mode and manner in which the same was invested by the said firm, and by said Slough since the dissolution of said firm ; and she is informed, and charges that, in the manner said account was kept by said firm, and by said Slough since its dissolution, the items of the account are numerous, running through a series of years, and are complicated, and can only be properly adjusted, and the account properly stated, by a court of equity."

The prayer of the bill was, that an account might be taken, "not only of the amount received from or for complainant, and passed into the books of Slough, Dent & Co., or which said firm may have used and enjoyed, with interest thereon, but also upon any profits made by said firm, or by said Slough since its dissolution, should such profits be found to exceed the interest"; that the books of the partnership might be produced, and also the books kept by Slough since its dissolution ; that a decree might

be rendered in favor of the complainant for the amount so found due to her; "that any property, equitable interests, rights, choses in action, or other things, which her separate property may have contributed to acquire, may be charged with such amount so found due to her, and held to satisfy the same, unless, upon discovery, she elect to claim an interest in such property; and for the orders necessary to that end."

The chancellor sustained a demurrer to the bill for want of equity, on the ground that the complainant had an adequate remedy at law; and his decree is now assigned as error.

J. L. SMITH, for appellant.—1. The money which the complainant's husband invested in the partnership was charged with a trust, and was received by the defendant with a knowledge of the trust. The transaction can not be treated as a loan to the firm, except at the option of the wife. The husband could not lend to the firm of which he was a member, the firm having a knowledge of the nature of the fund. He could not sue, at law, the firm of which he was a partner. The husband had no right to subject the trust estate to the hazards of trade, and the wife might have enjoined him. As to the wife's right to charge the defendant as an implied trustee with the profits realized from the use of her funds, see *Hill on Trustees*, 171, 172, 173; 2 *Story's Equity*, § 1258; *Collyer on Partnership*, § 456, and cases cited in note; *Palmer v. Mitchell*, 2 My. & K. (8 Eng. Ch.) 181; *Freeman v. Fairlee*, 3 Mer. 44; *Stewart & Irvine v. Fry's Adm'r*, 3 Ala. 579.

2. The bill ought certainly to have been sustained on the grounds of discovery and account.—1 *Story's Equity*, §§ 462-4, 458; *Halsted v. Rabb*, 8 Porter, 63; *Perrine v. Carlisle*, 19 Ala. 686; *Corporation &c. v. Wilson*, 13 Vesey, 279; *Weymouth v. Boyer*, 1 Vesey, 426; *Hunley v. Hunley*, 15 Ala. 98; *Dickerson v. Lockyer*, 4 Vesey, 36.

E. S. DARGAN, *contra*.—The husband was not liable for the rents and profits of the wife's separate estate.—Code, § 1983. The death of the husband discharged the trust,

and left the complainant's remedy at law adequate and complete.—*Sessions v. Sessions*, 33 Ala. 525; *Bennett v. Bennett*, 36 Ala. 572.

BYRD, J.—1. Dennis Dent was not liable for the profits of the separate estate of his wife held under the Code, although he used the *corpus* and *income* in business with another.—Code, § 1983; *Weems v. Bryan*, 21 Ala. 302; *Sessions v. Sessions*, 33 Ala. 522; *Andrews et al. v. Huckabee*, 30 Ala. 152; *Whitman v. Abernathy*, 33 Ala. 154; *Bennett v. Bennett*, 34 Ala. 53.

2. Upon the death of the husband, the separate estate of the wife is discharged of the trust, and the legal title vests absolutely in her.—*Andrews v. Huckabee, supra*. And she may sue at law for its recovery, and can not sue in equity, unless she can do so upon some ground *independent* of the existence of the former relation of trustee, which the law imposed upon the husband.—*Sessions v. Sessions, supra*; *Bennett's Adm'r v. Bennett*, 36 Ala. 572.

3. The trust funds in the hands of the husband, though mingled with his own, and incapable of being distinguished, will not be chargeable with the trust, but will remain a mere moneyed liability, and the wife must come in as a general creditor against his estate. If he carries on a mercantile business with the trust funds, the trust can not be visited on the business.—*Goldsmith v. Stetson*, 30 Ala. 167. And upon the same principle, the wife can not visit the trust upon the funds in the hands of the partner of the husband during his life, nor after his death, for any profits realized in the partnership business. And this court having decided, that by the death of the husband the trust ceases, and the legal title vests absolutely in the wife discharged of the trust, it would seem to follow, that the surviving partner of the husband is not liable to account for any profits he may have realized from the funds after the death of the husband, and that he is only liable as a debtor for the principal and interest.

4. The allegations of the third and ninth paragraphs of the bill, taken in connection with the averments of the bill, and the prayer thereof, entitle appellant to a discovery and

account from the appellee, as the surviving partner of the firm of Slough, Dent & Co.—1 Story's Eq. Jur. §§ 70 to 74; 2 *ib.* §§ 689 to 691; *Perrine v. Carlisle*, 19 Ala. 686; *Halsted v. Rabb*, 8 Porter, 63; *Knott v. Tarver*, 8 Ala. 743; *Nelson v. Dunn*, 15 Ala. 502. But the discovery and account will be limited to the amount of the money of the separate estate received by the firm of Slough, Dent & Co., and the disbursements made by them and properly chargeable against appellant, and interest on the amount due her at the death of her husband. Any payments or disbursements made to, or on her account, legally chargeable against her, will also be matter for the consideration of the chancellor, as also all other matters connected with the settlement of the account.

The decree of the chancellor, dismissing the bill, is reversed, and the cause remanded for further proceedings.

LESLIE vs. LANGHAM'S EXECUTORS.

[ACTION ON NOTE GIVEN FOR HIRE OF SLAVE.]

1. *Cross assignments of error.*—The appellee will not be allowed, even with the consent of the appellant, to make cross assignments of error, unless he reserved a bill of exceptions to the rulings of the court below; and it is not sufficient that his exceptions are stated in the appellant's bill.
2. *Presumption in favor of affirmative charge.*—Where the bill of exceptions does not purport to contain all the evidence that was introduced on the trial, an affirmative charge will be presumed to have been justified by the evidence, unless the evidence which is set out shows that it is erroneous.
3. *Hiring of slave; loss of services.*—In the absence of an express stipulation in a contract for the hiring of a slave, the hirer must bear all losses which occur during the term, except those which are caused by the act or conduct of the owner.
4. *President Lincoln's emancipation proclamation of January, 1863; abolition of slavery.*—Slavery was destroyed in this State, by force of arms, in May, 1865; and prior to that time, whether Alabama was in or out of the Union, the emancipation proclamation issued by the president of the United States in January, 1863, had no force here.

5. *Parol agreement for discharge of note in Confederate money.*—Where a promissory note, given for the hire of a slave for the year 1865, on its face was payable in money, a parol understanding between the parties, that it might be paid or discharged in Confederate States treasury-notes, cannot be received to defeat a recovery on it: the ordinance of the State convention, No. 26, adopted on the 28th September, 1865, does not apply to such case.
6. *Abstract charge.*—A charge which is abstract, may be refused on that ground.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN K. HENRY.

THIS action was brought by the executors of L. L. Langham, deceased, against John W. Leslie, and was commenced on the 16th April, 1866. The complaint alleged, that the plaintiffs, as executors, claimed of the defendant the sum of three hundred and ninety dollars, "due by promissory note made by him and one J. M. Harrington, on the 2d day of January, 1865, and payable on the 1st day of January, 1866, for the hire of a negro slave, named William, for the year 1865." The defendant pleaded, "that he does not owe the said sum of money in said complaint named, nor any part thereof"; and issue was joined on that plea. The trial was had by consent, at the April term, 1866, when the following bill of exceptions was reserved:

"On the trial of this cause, which was an action on a promissory note given for the hire of a slave for the year 1865, it was agreed by and between the parties, that the negro named in the complaint, and in the note which was the foundation of the suit, was born a slave, and was held and claimed as such by the plaintiffs, as executors of L. L. Langham, deceased, on the 2d day of January, 1865, under the laws of Alabama; that said slave passed into the possession of the defendant, on the 2d day of January, 1865, under the contract of hiring as set out in the complaint, and remained in his possession until the 1st day of May, 1865, when the military authorities of the United States took possession of the country; and that the negro then left the defendant's service, of his own accord, without any act or fault on the part of either of the parties to this suit, and returned to that service no more. The

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plaintiffs then read in evidence to the jury the note sued on, without objection. The parties waived all questions as to the jurisdiction of the court, predicated upon the amount of the verdict; and the plaintiffs then closed. The defendant then read in evidence President Lincoln's emancipation proclamation, dated the 1st January, 1863; and offered to prove, by parol evidence, the comparative value of Confederate currency at the date of the contract, and the present national currency, or par funds. To the introduction of this testimony the plaintiffs objected; but their objections were overruled, and the evidence admitted; to which the plaintiffs excepted. The defendant then offered parol evidence, tending to show that, at the date of said contract, it was understood by and between the parties that the same was to be paid and discharged in Confederate currency or treasury-notes; to which testimony the plaintiffs objected, but their objection was overruled, and the testimony admitted; to which the plaintiffs excepted.

"The court charged the jury, among other things, that under the agreed state of facts, and the other evidence in the case, if they believed that the note sued on, according to the contract, was to be discharged in Confederate treasury-notes, they might ascertain, from such proof and agreed state of facts, what was the true value of the consideration of the note, and what amount the plaintiffs were justly, legally, and equitably entitled to recover in par funds, according to said contract, for and during the time the defendant actually received the services of the negro, to-wit, from the date of the hiring to the surrender of General Taylor to the United States forces, in May, 1865, and render a verdict in their favor for that amount; to which charge the defendant excepted.

"The plaintiffs then asked the court to instruct the jury, that if they believed the evidence, the plaintiffs were entitled to recover the full amount of the note sued on; which charge the court refused to give, and the plaintiffs excepted to its refusal.

"The plaintiffs then asked the court to charge the jury, that if they believed the evidence, the plaintiffs were entitled to recover the full amount of the note sued on; which

charge the court refused to give, and the plaintiffs excepted.

"The plaintiffs then asked the court to charge the jury, that if they believed the evidence, the plaintiffs were entitled to recover for the hire of the negro up to the date of the ordinance, No. 6, adopted by the State convention on the 22d September, 1865; which charge the court refused to give, and the plaintiffs excepted.

"The defendant then asked the court to charge the jury, that if they were satisfied, from the evidence, that it was understood between the parties, at the date of the contract, that the same was to be discharged in Confederate States treasury-notes, the contract was contrary to public policy, and was null and void; which charge the court refused to give, and the defendant excepted.

"The defendant then asked the court to charge the jury, that if they were satisfied, from the evidence, that it was understood between the parties, at the date of the contract sued on, that the same was to be discharged in Confederate treasury-notes, the contract was contrary to public policy, and was null and void; which charge the court refused to give, and the defendant excepted.

"The defendant then asked the court to instruct the jury, that by virtue of the proclamation of President Lincoln, dated the 1st January, 1863, all slaves in the States then in rebellion, in contemplation of law, became free; and that if the boy William was hired as a slave, and without his consent, the contract of hiring was void; which charge the court refused to give, and the defendant excepted.

"The defendant then asked the court to charge the jury, that the third section of the ordinance of the State convention, No. 26, adopted on the 28th September, 1865, contained provisions impairing the obligation of contracts, and, to that extent, was void; which charge the court refused to give, and the defendant excepted."

The appeal is sued out by the defendant, and the errors assigned by him are the several rulings of the court to which he reserved exceptions. By consent, entered of record, it was agreed that the appellees might assign errors, "to the same extent as if they had appealed from the judgment and rulings of the court below"; and under this

agreement the appellees assign as error all the rulings of the court below to which, as above stated, they excepted.

PETTUS & DAWSON, for appellant.

R. C. TORREY, *contra*.

BYRD, J.—1. The appellees have made an assignment of errors, with the consent of appellant. It does not appear that they took any bill of exceptions; and under the law, and the consent endorsed on the record, they have no right to assign errors on the bill taken by the appellant.—Code, § 2354.

2. The promissory note upon which the suit was brought is not set out in the record, and we must construe it as it is set out in the complaint. The bill of exceptions does not purport to set out all the evidence introduced on the trial; and in the absence of a copy of the note, and of the evidence introduced, we cannot hold that the court below erred in the charge given.

3. It has long been settled in this State, that the hirer of a slave for a fixed period becomes a purchaser of the slave for that period; and that if the slave dies before its expiration, the loss for the balance of the term of hiring must be borne by the hirer. A recovery for the entire amount of the contract cannot be defeated, by showing that the hirer was prevented by the act of God from deriving a profit from the services of the slave.—*Ricks v. Dillahunt*, 8 Porter, 133; *Outlaw et al. v. Cook*, Minor, 257. In the latter case, the court say: "The tenant or hirer is considered as a purchaser for a limited time, and takes the property subject, during the continuance of the interest, to the same risks as if he were the purchaser of the fee simple." If the court below erred on this question, it was in favor of the appellant. In the absence of any stipulation controlling the matter, we are satisfied that the hirer must bear all losses which occur during the term of hiring, unless they are occasioned by the act or conduct of the owner of the slave, or the person from whom the hirer employed him; and this we conceive to be true as a general rule.

4. In the case of *Jeffreys and Jeffreys v. The State*, decided

at the January term, 1866, we held, that slavery in this State was destroyed in May, 1865. Whether the State was in or out of the Union at the issuance of the proclamation of President Lincoln, in January, 1863, makes no distinction or difference. If in the Union, he had no constitutional authority, nor had congress any to confer on him, to issue and enforce it at that time ; and if out of the Union, *in either case*, it could have no force or validity until the Federal government was enabled by conquest, or the power of arms, to enforce it. Under the law as above announced, the appellee was entitled to recover ; and we are unable to see that the appellant has any cause of complaint as to the amount of the recovery.

5. Though the court permitted evidence to go to the jury, to show that it was understood between the parties that the note was to be paid in Confederate treasury-notes ; yet we must presume from the complaint, and the fact that proof was made of such understanding, that the note did not so stipulate ; and the court did not therefore err, in refusing to give the first charge asked by the appellant. The effect of such a charge would be to authorize the interpolation of a stipulation which was not a part of the written contract. The subject of the contract was the hire of a slave, which at the time was lawful ; if it had not been, parol evidence would have been admissible to show that it was not. A parol understanding to receive Confederate treasury-notes in payment, when the contract is written, and lawful, and payable in money, is not a part of the contract, and, therefore, not obligatory on either party thereto.

It is true that an ordinance of the convention of 1865 authorizes the courts to inquire into the consideration of a contract, and that the parties contracted to pay and receive Confederate treasury-notes in discharge of the contract ; but this was permitted for the purpose of ascertaining the amount of the recovery, and not to defeat it *in toto*. For the former purpose, the evidence *might have been* admissible, but in no event for the latter.—Addison on Contracts, pp. 148, 841-2.

6. The last charge asked by the defendant was abstract,

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and, so far as we can see, the refusal to give it was beneficial to appellant; and if correct as a general proposition, the refusal to give it worked no injury to him.

It only remains for us to say that there is no error in the record, of which appellant can complain, and that the judgment must be affirmed.

TURNER'S ADM'R vs. WHITTEN.

[PETITION FOR ALLOTMENT OF PERSONAL PROPERTY FOR USE OF DECEDENT'S FAMILY.]

1. *Exemption of property for use of decedent's family.*—On the death of a widow, whose family is composed of an only child, the child is entitled to the benefit of the exemption provided by the statute, (Code, § 1738,) for the family of a decedent.
2. *Jurisdiction of probate court to allot exempt property.*—Under the general grant of jurisdiction "for orphans' business," the probate court has the authority, under a petition filed by the members of a decedent's family, to allot to them the personal property to which they are entitled under section 1738 of the Code.

APPEAL from the Probate Court of Lowndes.

IN the matter of the petition of Mrs. Anna Whitten, the wife of C. H. Whitten, for an allotment to her of certain articles of household and kitchen furniture, which were in her possession, and which she claimed under section 1738 of the Code. The record does not show when the petition was filed. The cause was heard on the 12th February, 1867. The petition alleged, that said petitioner was the daughter and only child of Mrs. Harriet S. Turner, deceased, and lived with her mother at the time of her mother's death, which occurred in 1863; that she was unmarried at the time of her mother's death, and was the sole surviving member of her family; that letters of administration on her mother's estate were granted, by the probate court of said county,

to J. H. Kendrick; that the petitioner, as the sole surviving member of the family, was entitled, under the statutes of the State, "to certain household and kitchen furniture, belonging to, and in the possession of her said mother, at the time of her death"; that none had been set apart to her, either by the administrator, or by order of the probate court; that the administrator had sold the greater part of the furniture, but the petitioner still retained in her possession certain articles, which she specified, and which she asked might be set apart to her by order of the court. The administrator appeared, and demurred to the petition; but the court overruled his demurrer. The grounds of demurrer, if any were specified, are not stated in the record.

"On the hearing," as the bill of exceptions states, "it appeared in evidence that the petitioner was the wife of C. H. Whitten, and was under twenty-one years of age, but was living with her mother, Mrs. Harriet S. Turner, at the time of her death, and was then unmarried, and was the only surviving member of her mother's family; that she had been in possession of the property in dispute, ever since her mother's death; that her father, Thomas U. Turner, died several years before her mother, and left a considerable estate, consisting of both real and personal property, which was administered in the probate court of said county; that her mother afterwards married again, but survived her second husband; that the said Harriet S. Turner, at her death, left an estate of both real and personal property, which has since been declared insolvent; and that it is out of this estate the petitioner seeks to have set apart to her the said property specified in her petition. The administrator objected to the petition, and to any allowance under it out of the estate; insisting that the statute applied only to the estate of the father, and not of the mother. The court overruled the objection, and granted the prayer of the petition, and ordered the property specified in the petition to be set aside for the petitioner; to which order the administrator excepted."

The administrator now assigns as error—"1st, that the court erred in taking jurisdiction of the petition; 2d, in

overruling the demurrer ; 3d, in the decree rendered ; and, 4th, as shown by the bill of exceptions."

CLEMENTS & WILLIAMSON, for appellant.

W. C. GRIFFIN, *contra*.

A. J. WALKER, C. J.—The most important question of this case is, whether the child, who composed the family of a widow, is, upon the death of the latter, entitled to the benefit of the exemption provided by section 1738 of the Code and the statutes amending it.

In the construction of statutes, we are permitted, when there is any doubt or ambiguity, to seek the intention of the legislature, by inquiring after the mischief and defect to be remedied, and the reason of the law.—*Huffman v. State*, 29 Ala. 40 ; Sedgwick on Statutory and Constitutional Law, pp. 231–236.

"The object of the legislature, in the enactment of the" law in question, "doubtless was to provide the family of the deceased with the present means of subsistence and comfort, by allowing them to retain, free from account on the part of the executor or administrator, such articles as were indispensable for their maintenance and convenience."—*Carter v. Hinkle*, 13 Ala. 529. No conceivable reason for a discrimination against the children of a deceased widow can be found. Why should the children of a deceased man have the benefit of the exemption, while it is denied to the children of a deceased widow ?

The section of the Code uses the masculine pronoun ; but, under section 1 of the Code, the masculine includes the feminine. The act of 30th January, 1860, (Pamphlet Acts, p. 18,) amends section 1738 of the Code, by giving the exemption operation against "heirs, distributees, or legatees." It uses the word "man"; but the fact that it was framed in reference to a section of the Code, and with a view to its amendment, affords a strong persuasive argument, that its language was adopted in reference to the provision which declares that the masculine includes the feminine. It is obviously used as a generic term, and includes females as well as males.

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2. We entertain no doubt that, under its general grant of jurisdiction "for orphans' business," the probate court had the authority which it exercised in this case.—*Mims v. Sturdevant*, 23 Ala. 664; *S. C.*, 36 Ala. 636; *Mims' Adm'r v. Mims*, 39 Ala. 716; *Dobbs v. Cockerham*, 2 Porter, 328; *Merrill v. Jones*, 8 Porter, 557.

Affirmed.

MCCARTNEY'S ADM'R vs. BONE AND WIFE.

[CITATION TO ADMINISTRATOR FOR FINAL SETTLEMENT.]

1. *Presumption of settlement from lapse of time.*—After the lapse of twenty years from the time when an executor or administrator may be cited to a final settlement, the presumption of settlement and payment arises in his favor; and this presumption is not rebutted or destroyed by proof of any disability, such as infancy or coverture, on the part of the distributees by whom he is afterwards cited to a settlement.

APPEAL from the Probate Court of Madison.

IN the matter of the estate of James McCartney, deceased, on the application of Matthew H. Bone and Martha, his wife, (formerly the widow of said James McCartney,) to compel a final settlement of the accounts and vouchers of Fleming Jordan, as administrator. • The deceased died in 1831; and letters of administration on his estate were granted by the orphans' court of said county, on the 29th August, 1831, to said Fleming Jordan and the decedent's widow. The widow married George I. Weaver, on the 29th January, 1833; and on the 16th August, 1842, after the death of said Weaver, she married said Matthew H. Bone. On the 9th November, 1841, said Jordan filed his accounts and vouchers for a final settlement; and a decree was thereon rendered by said court, allowing the account as stated, and adjudging to the widow and the two infant

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distributees, each, their portion of the balance ascertained to be in the hands of the administrator; but this decree was never regularly entered on the minutes. The citation in this case was issued on the 18th August, 1857. The administrator appeared, in answer to the citation, and objected to filing an account, on account of the lapse of time. The court overruled the objection, and required him to file an account; and on the account thus filed, rendered a final decree against him, on the 25th April, 1859. The administrator reserved an exception to the overruling of his objection, and also to several rulings of the court on the hearing; and he here assigns these several matters as error, together with the final decree of the court.

JAMES ROBINSON, for appellant.—The lapse of twenty years from the time when an administrator may be compelled to make a final settlement, raises the presumption of settlement in his favor, and bars any proceedings against him after that time.—*Rhodes v. Turner and Wife*, 21 Ala. 217; *Barnett's Executor v. Tarrence*, 23 Ala. 466; *Gaunt's Adm'r v. Phillips*, 23 Ala. 275; *McArthur v. Carrie's Adm'r*, 32 Ala. 91. This rule is intended to protect executors and administrators, and the presumption is conclusive.

WALKER & BRICKELL, *contra*.—The presumption of payment or settlement, arising from lapse of time, is not conclusive, but is liable to be disputed and rebutted by circumstances. Originally adopted in equity to discourage stale demands, and then applied at law to cases which were not within the strict letter of the statute of limitations, it was subjected to all the exceptions recognized by that statute, and other exceptions even were allowed. Infancy and coverture are express exceptions from the statute, and the same effect must be allowed to them when the presumption is set up as a bar.—1 Greenl. Ev. 39; 1 Cowen & Hill's Notes, 504; Matthews on Presumptive Evidence, 16; *Penrose v. King*, 1 Yeates, 544; *Dunlop v. Ball*, 2 Cranch, 180; *Mitchell v. Owinge*, 3 Marsh. 316; *Bearden v. Searcy*, 3 Marsh. 544; *Bartlett v. Bartlett*, 9 N. H.; *Bailey v. Jackson*, 16 John. 210; *Abbott v. Godfrey*, 1 Mann. (Mich.) 178;

Gray v. Givens, 2 Hill's Ch. 514; *McQueen v. Fletcher*, 4 Rich. Eq. 152.

2. The attempted settlement in 1841, though invalid as a settlement, was a recognition that the trust was then subsisting, and prevented the operation of the presumption, as an admission will prevent or remove the bar of the statute of limitations.—*Blackwell v. Blackwell*, 33 Ala. 61; *McQueen v. Fletcher*, 4 Rich. Eq. 152; *Stout v. Swan*, 3 Barr, 235; *McDowell v. McCullough*, 17 Serg. & R. 53.

BYRD, J.—In 1857 the appellees caused a citation to be issued from the probate court of Madison county to the appellant, requiring him to appear and show cause why he should not make a final settlement of his administration of the estate of James McCartney, deceased. He appeared, and for cause averred, that McCartney died, intestate, early in the year 1831; that on the 29th day of August of that year, the then orphans' court of said county granted letters of administration to one of the appellees and appellant; that they gave a joint administration bond, "qualified, and took on them the burden of said office"; that said appellee has never resigned her said office, nor have said letters in any manner been revoked or vacated; that appellant, on the 9th day of November, 1841, filed an account between himself and said estate, as such administrator, and his vouchers for a final settlement of his said administration; and that on the 9th day of November, 1841, the then judge of said court allowed said account, and made a decree thereon.

Upon these facts, the appellant objected to state and file any account of his said administration, because of the lapse of time since the grant of administration. The court overruled the objection, and appellant excepted, and then filed an account, upon which a decree was rendered against him.

It appears that over twenty-five years elapsed after the grant of letters of administration, and before the commencement of this proceeding; and more than twenty years after appellant could have been called upon to make a final settlement of his administration of the estate. Upon such a state of facts, the objection of the appellant was well

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made, and should have been sustained.—*Gaunt's Adm'rs v. Phillips*, 23 Ala. 275; *Barnett's Ex'rs v. Tarrence*, 23 Ala. 466; *McArthur v. Carrie's Adm'r*, 32 Ala. 91; *Blackwell's Adm'rs v. Blackwell*, 33 Ala. 58; *Rhodes, ex'r &c. v. Turner and Wife*, 21 Ala. 217; *Worley v. High, adm'r*, at the last term; *Milton v. Haden*, 33 Ala. 30; *Austin v. Jordan*, 35 Ala. 642.

The fact that appellant, in 1841, filed an account for a final settlement, upon which a decree was rendered, without notice to the distributees, does not relieve the case from the influence of the principles settled in the cases above cited. The tendency of the fact was not in conflict with the presumption that a final settlement with the distributees had been made by appellant; but it was entirely consistent with, if not in corroboration of, such a presumption. Without asserting that the lapse of twenty years raises a conclusive presumption of such a settlement, (as to which, see the case of *McArthur v. Carrie's Adm'r*, *supra*,) we are satisfied that the evident result of the decisions of this court, and of the reasoning employed in the opinions thereof, is the establishment of the rule, that after the lapse of twenty years from the time when an administrator may be called upon to make distribution of the estate of his intestate, he cannot be compelled to make a distribution thereof, unless he has made some admission binding in law, or done some act which will remove the bar created by the presumption in favor of a settlement with the distributees; and no disability on their part, such as infancy or marriage, will avail to rebut the presumption. If so, then the reasoning in the cases of *Rhodes v. Turner*, *Barnett v. Tarrence*, and *Austin v. Jordan*, is unsound. It is said in the first case, and quoted in the other two, that, "if the parties allow this period to elapse, without taking any steps to compel a settlement, we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence, to prove the accounts and vouchers which ordinarily enter into such settlements, and which, after such a lapse of time, it would perhaps be impossible to obtain. The period of twenty years, we apprehend, would date from the time

when the administrator might have been called to a final settlement of the estate." This reasoning applies with as much force against distributees who are infants, as against those who are adults, and no discrimination has been made between them in the application of this presumption, by the adjudications of this court.

We admit that other courts have made decisions adverse to this view, and have allowed deductions to be made on account of such disabilities. In the cases of *Milton v. Haden*, and *McArthur v. Carrie's Adm'r*, *supra*, it is decided that this presumption may be overturned; but that "proof, to be effectual for this purpose, *must* be addressed to the character of the plaintiff's possession, either in *acquisition* or *use*." This was said with reference to the possession of personal property for twenty years; and we see no reason why the same rule should not be applicable, by analogy, to a legal duty or obligation of this character.

Much strength is given to this conclusion, by a reference to the powers which our statutes have always conferred on the orphans' and probate courts over the settlement of administrators and estates. The presumption is one in favor, and for the protection, of administrators. This presumption does not apply, where the statute of limitations is applicable, except so far as section 2486 of the Code does so; and therefore the provisions of that section do not apply to a case like this. This rule has been so long acquiesced in, as to become a rule of property, which should not be unsettled without the highest and weightiest reasons and considerations. If a disability should exist through the whole period of twenty years, and there should be *no one authorized by law* to receive payment for the party to whom the disability attached, then an exception *might* be made in favor of such party, similar to the one allowed where staleness is insisted on as a bar to an equitable demand. But that question does not arise in this case, and we intimate no opinion upon it.—*Johnson v. Johnson*, 5 Ala. 90.

This view of the case relieves us from the necessity of an adjudication of the other questions raised by the assignments of error, and discussed by counsel; especially, as upon another trial the facts may be materially variant.

Being satisfied that, upon the record and the authorities herein referred to, the court below erred in the decree rendered, it only remains for us to say that the decree of the probate court must be reversed, and the cause remanded.

BROOKS *vs.* WOODS.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR PURCHASE-MONEY OF LAND; CROSS BILL BY PURCHASER'S WIDOW FOR ASSIGNMENT OF DOWER.]

1. *Jurisdiction of equity to assign dower.*—The rule is settled, that courts of equity will, in all cases, entertain concurrent jurisdiction with courts of law in the assignment of dower.
2. *When appeal lies.*—Where a bill is filed to enforce a vendor's lien for the unpaid purchase-money of land, against the widow, personal representative, and heirs-at-law of the deceased purchaser, and the widow files a cross bill for an assignment of her dower in the lands, an appeal lies from a decree dismissing her cross bill.
3. *Assignment of dower under cross bill, on bill filed to enforce vendor's lien.*—Although the vendor's lien for the unpaid purchase-money of land is superior to the right of the purchaser's widow to dower in the lands; yet she may maintain a cross bill for an assignment of her dower, where the original bill is filed to enforce the vendor's lien because she is entitled to an account of the rents and profits, and has a right to appropriate them to the discharge of the lien, or to discharge it in any other manner.
4. *Vendor's lien paramount to widow's dower.*—Where the purchaser gives his notes, without security, for the agreed price of the land, and the vendor conveys the title to him by deed, the vendor's lien on the land for the unpaid purchase-money is superior to the right of dower on the part of the purchaser's widow.

APPEAL from the Chancery Court of Calhoun.

Heard before the Hon. S. K. McSPADDEN.

THE original bill in this cause was filed, on the 23d November, 1863, by Alexander Woods, against the widow, personal representative, and heirs-at-law of Benjamin A. Brooks, deceased; and sought to enforce a vendor's lien for

the unpaid purchase-money of several town lots in Jacksonville. The lots were sold to said Brooks, in December, 1860, by Philip Beacham; and a deed, conveying the title to him, was executed by said Beacham and wife. The agreed price of the lots was twelve hundred dollars, for which Brooks gave his three notes; one for two hundred dollars, dated December 25, 1860, payable twelve months after date; one for one hundred and sixty-eight dollars, dated December 28, 1860, and payable two months after date; and one for eight hundred and thirty-two dollars, dated the 28th December, 1860, and payable on the 24th November, 1861. On the day of its date, Beacham assigned the last note, for valuable consideration, to said Alexander Woods; and, on the 20th June, 1863, also transferred to him the other two notes, "on which several small payments had been made;" and Woods filed his bill to enforce the lien, as the assignee of the notes. Said Brooks died in September, 1861, intestate, leaving no children or descendants. Letters of administration on his estate were granted, by the probate court of the county, to Gabriel B. Douthitt; and said administrator took possession of the lots, and rented them out under the orders of the probate court.

The widow filed her answer to the original bill, on the 27th June, 1864; and on the same day a decree *pro confesso* was taken against the other defendants. On the 30th June, 1864, the widow filed her cross bill in the cause, claiming her dower in the lots, and praying that it might be allotted and set apart to her, that an account might be taken "of the rental value of said premises," and that the administrator be required to pay over to her "the share to which she may be entitled;" and the general prayer, for other and further relief according to the nature of her case, was added. The defendant Woods filed an answer to the cross bill, and also a demurrer for want of equity. The chancellor sustained the demurrer, and dismissed the cross bill; and his decree is now assigned as error. The transcript does not contain the original bill, nor any of the proceedings connected with it. There is a joinder in error on the part of the appellees.

M. J. TURNLEY, for appellant.

ELLIS & FORNEY, *contra*.

BYRD, J.—1. It is laid down as a general rule, that courts of equity will entertain concurrent jurisdiction with courts of law in the assignment of dower in all cases. This has been questioned, but the weight of authority sustains the rule.—1 Story's Equity Jur., § 624; *Owen v. Slatter*, 26 Ala. 547.

2. The appellee joins in the assignments of error, and this case is not like that of *Parish Adm'r v. Galloway*, 34 Ala. 163.

3. The right of a widow to dower in the lands of the husband is said to be founded on three consecutive events—marriage, *seizin*, and the death of the latter. These the bill alleges, and shows a right to dower in the lands described. Conceding that the lien of the vendor is superior to the right of the dowress, in the event she fails to show such a beneficial *seizin* of the vendee during his life as will make her right superior to the lien of the vendor, still, she is entitled to dower as against all the world, except the vendor, or his assignee; and although she sets up her claim as superior to his, yet, if she fails to make that good, she will be entitled, after the lien is discharged, to dower in the surplus, if there should be any; and she is also entitled in equity to an account of the rents and profits from the administrator, or the parties who received them; (*Boynton v. Sawyer and Wife*, 35 Ala. 500, and authorities cited in this opinion;) and may appropriate so much thereof as she may be entitled to, in discharge of the lien, or she may discharge it in any other mode, and thereby perfect her right to dower in the land. The cross bill therefore has equity.

4. We feel constrained to hold, that if the vendee gave his promissory notes, without any security whatsoever, to the vendor, for the consideration money of the purchase; and the vendor thereupon executed a deed, conveying the title to the land to the vendee, without any waiver of his lien, then or subsequently, which would be binding on him, the right of the widow of the vendee would be subordinate to the lien of the vendor or his assignee. The current of

American authorities is too strong in that direction for us to resist them.—Scribner on Dower, 530; Willard's Equity Jur. 697; Hilliard on Mortgages, 631, § 29; 2 Story's Equity Jur., §§ 1217, 1218; 4 Kent, 50-3; *Warner v. Van Alstyne*, 3 Paige, 513; *Wilson v. Davidson*, 2 Rob. (Va.) 384; *Bisland v. Hewett et al.*, 11 Sm. & Mar. 164; *McClure v. Harris*, 12 B. Mon. 264; *Firestone v. Firestone*, 2 Ohio (N. S.) 415; 42 N. H. 296.

It is unnecessary to cite further. In this State, this question, in its present form at least, has never been adjudicated. It is true that, in the case of *Eslava v. Lepretre*, (21 Ala. 504,) there is an expression used in the opinion, which, when applied to the facts of that case, would indicate, that this court then held that the vendor's lien was subordinate to the right of the widow to dower, as to that part of the land which the mortgage in that case did not reconvey to the vendor. But this question was not necessarily involved in the decision of that cause, and, even if it were, the reasoning in the cases of *Edmonson v. Montague*, (14 Ala. R.,) and *Burns v. Taylor*, (23 Ala. 268,) and *Harrison v. Boyd*, (36 Ala. 533,) is favorable to the conclusion, that the vendor's lien is superior to the right of the dowress.

A deed of conveyance in fee to, accompanied with possession of, the vendee, constitutes, in this State, a *seizin* in him, within the meaning of section 1354 of the Code, which prescribes in what real estate of the husband the widow is entitled to dower. And by the strict rule of the common law, such a *seizin* was sufficient to entitle her to dower against all persons, except such as had a superior title. I have found no case or authority in which such a lien as this has been held to be superior to the right of a dowress in England. But the weight of American authorities may now be held to be conclusive, wherever the lien of the vendor is recognized by law, as a valid incumbrance, *after* the vendor conveys the legal title.

It seems to us that it would have been more in harmony with the principles of the common law to have held, that whenever a vendor conveyed the title, and put the vendee in possession, thereby creating a *seizin in law and fact*, he

by his own act invested the vendee with such *a title* and *seizin* as entitled the widow of the latter to dower, discharged of the incumbrance. Many difficult questions which arise under the rule adopted, would then have been avoided, or easily solved.

It appears from the cross bill, that a part of the purchase-money has been paid. If, upon a sale of the land, it should bring more than enough to pay the balance of the purchase-money, in the event it is held upon the proof to be subject to the payment thereof, a question may arise, whether the appellant is entitled to share in the surplus proceeds of the sale as personalty or realty. The better course would be, to sell the lots separately, if it can be done advantageously, until a sufficient amount is raised to pay the balance due to the vendor, and allot dower in the remainder to the appellant. If the proceeds of the sale should exceed the amount of the purchase-money still due, then the cases hereinbefore cited will show to what interest the appellant is dowable and if she, or the administrator of the husband, or both, should discharge the lien, or any part of the purchase-money, the same cases will furnish a rule for the court in the allotment of dower.

It results that the decree of the chancellor, dismissing the cross bill of appellant, must be reversed, and the cause remanded, at the costs of the appellee Woods.

GRIEL *vs.* HUNTER.

[TRESPASS AGAINST SHERIFF.]

1. *Liability of sheriff as trespasser ab initio.*—A sheriff who levies an attachment on a horse, and, after keeping him twenty-one days, sells him at public auction, without an order of court, the week before the commencement of the term to which the attachment was returnable; the sale being made on the ground that "the charge of keeping the property is very great", (Code, § 2529,) and ten days' notice of it be-

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ing given,—is not liable as a trespasser *ab initio*, either on account of the sale under such circumstances, or on account of his failure to sell at an earlier day.

2. *Same; premature commencement of action.*—In trespass against a sheriff for levying an attachment against plaintiff's vendor on a horse which was in the plaintiff's possession under his alleged purchase, a recovery cannot be had against the defendant, as a trespasser *ab initio*, on account of an irregular or illegal sale under the process after the commencement of the action, unless the evidence warrants the conclusion that he intended from the first to abuse his lawful authority.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Nathan Griel, against William H. Hunter, and was commenced on the 16th February, 1859. The plaintiff, in his complaint, claimed "two thousand dollars damages for wrongfully taking, on the 14th day of February, 1859, two horses, the property of plaintiff." The cause was tried, at the October term, 1866, "under an agreement to consider as filed all pleas in bar and replications thereto which could be legally filed, and issues duly joined as to all matters which might appear in the evidence." The plaintiff claimed the horses under a purchase from one Isaac H. Lenneberg, and the defendant justified under an attachment against said Lenneberg, which came to his hands as sheriff, and was levied by him on the horses as the property of said Lenneberg.

"On the trial," as the bill of exceptions states, "the plaintiff's evidence showed that, on the 31st day of January, 1859, and for many months prior to that day, Isaac H. Lenneberg possessed and owned the said horses, and, on that day, signed and delivered to him an instrument of writing as follows." (This writing is in the form of an account for goods, wares, and merchandize, bought by plaintiff from said Lenneberg, in January, 1859; specifies various articles of dry goods, with the price of each; and, at the end of the account, "two horses and wagon, \$200"; the whole amounting to \$533.12, for which a receipt in full was written at the foot of the account, and signed by said Lenneberg.) "The plaintiff's evidence further showed, that the horses mentioned in said instrument were the horses de-

scribed in the complaint; that they were delivered to him by said Lenneberg, on said 31st January, 1859, and continued in his possession, from that day, until the 14th February, 1859, when they were taken from his possession by the defendant and one of his deputies. The plaintiff's evidence further tended to show that, for a long time prior to the 31st January, 1859, he had been in the employment of said Lenneberg as a peddler; that Lenneberg was a merchant in said county, and was indebted to him on account of his said services; and that the horses and goods mentioned in said writing were transferred to him by said Lenneberg in settlement and discharge of said indebtedness. There was, however, a conflict in the proof, on the question of the indebtedness of said Lenneberg to plaintiff. The horses were proved to be worth about one hundred dollars each."

"The defendant then read in evidence the following attachment, with the endorsement and return thereon, and the accompanying affidavit and bond." (The attachment was sued out, on the 12th February, 1859, by Charles Stone, against said Lenneberg, on the ground that the defendant was absconding; and was returnable to the next term of the circuit court of the county, to be held on the second Monday in March. The sheriff's return showed that the writ was levied by him, on the 14th February, 1859, "on one bay or brown horse, and one grey horse, as the property of Isaac W. Lenneberg"; and a subsequent endorsement by him was in these words: "Sold the above described horses on the first Monday in March, 1859, after having given ten days' notice in the *Chambers Tribune*, before the courthouse-door in the town of LaFayette, at public outcry; when Charles Stone became the highest and best bidder for the brown horse, at the sum of ninety dollars, and William Johnson became the highest and best bidder for the grey horse, at the sum of seventy dollars; and the money is herewith returned to the court. The above property sold because the charge of keeping it was very great." Beneath this endorsement is a memorandum, without date or signature, in these words: "Cost of keeping horses twenty-one days, twenty-one dollars.") "The evidence

showed that the horses mentioned in said levy and endorsement were the same horses mentioned in the complaint, and which the plaintiff received from said Lenneberg. It was then proved, on the part of the plaintiff, that the defendant admitted, about ten days ago, that he still had the money for the horse sold to Johnson, and that said Stone had never paid what he bid for the other horse, but had taken the horse for his debt on which said attachment was sued out; and the evidence tended to show that said attachment debt arose out of the sale of one of said horses, by said Stone to Lenneberg, in the spring of 1858."

"Upon the foregoing evidence, the court charged the jury, that the foregoing evidence did not show any such abuse of his authority by the defendant, as sheriff of the county, as could make him liable as a trespasser *ab initio*; and that the sale of said horses by the defendant, without any order of a court or judge, was not sufficient to make him a trespasser *ab initio*, or to deprive him of the protection of said attachment; to which charges, and to each part thereof, the plaintiff excepted."

The charges of the court are assigned as error.

RICE, SEMPLE & GOLDTHWAITE, for appellant.

W. H. BARNES, *contra*.

JUDGE, J.—The law is well settled, that mere *nonfeasance* does not make a trespasser *ab initio*. There must be such a positive act as, if done without authority, would be a trespass.—*The Six Carpenters' Case*, 1 Smith's L. C. 162, and authorities cited in notes to said case. To make one, who originally acted with propriety under legal process, liable *ab initio*, for subsequent illegal acts, he must be shown to have grossly abused the authority under which he acted. Such a mistake as a person of ordinary care and common intelligence might commit, will not amount to an abuse. *Taylor v. Jones*, 42 N. H. 25.

An application of these principles to the case before us, makes it one of easy solution. The property levied on was subject to the attachment; consequently, the levy was rightfully made. If, under section 2529 of the Code, it was

the duty of the sheriff to have sold the horses at an earlier period than twenty-one days after the levy, still the failure to do so, being a mere *nonfeasance*, did not amount to a trespass. If, as is contended, the sheriff erred in selling the horses one week before the meeting of the court, without an order authorizing the sale, this was not a gross abuse of his authority. Section 2529 of the Code contemplates a sale without an order of court, if the property "be of so perishing a nature that it will deteriorate greatly in value, or be destroyed before the meeting of the court, or if the charge of keeping it be very great." Under this section, a sheriff is necessarily vested with discretion; and nothing less than a gross abuse of it would make him liable as a trespasser *ab initio*.

The sheriff, in advertising and selling the horses, doubtless acted by analogy to the requirements of sections 2446 and 2447 of the Code, making it necessary to sell horses, when levied on by *execution* from courts of record, on the first Monday in the month, and to give ten days' notice of the sale by advertisement. The object intended to be accomplished by section 2529 of the Code, might be defeated in many cases, if such analogy was always pursued; and we must not be understood as holding that it would be proper to pursue it, in all cases.

2. One other point presented by the record may be noticed. Even if the act of selling was such an abuse of authority by the sheriff as would constitute him a trespasser from the beginning, still, it not appearing that the illegal exercise of authority was such as to warrant the conclusion that the sheriff intended *from the first* to do wrong, and to use his legal authority as a cover to his illegal conduct, the action was prematurely brought, it having been commenced more than two weeks *before* the sale.

My brethren both concur in an affirmance on the grounds stated above, but base their conclusion in part, also, upon the authority of the case of *Hartshorn v. Williams*, 31 Ala. 149.

Let the judgment be affirmed.

PAGE AND WIFE *vs.* MATTHEWS' ADM'R.

[SALE OF DECEDENT'S LANDS FOR EQUITABLE DIVISION.]

1. *Limitation of appeal.*—The act of the legislature approved on the 1st February, 1866, which gives an appeal from any decree of the probate court rendered between the 11th January, 1861, and the 25th September, 1865, at any time within six months after the passage of the act, (Session Acts, 1865-6, p. 64,) applies to decrees from which appeals were already barred at the passage of the act; and this application of the statute is not obnoxious to any constitutional provision, as taking away or impairing vested rights.
2. *Ratification of judgments by ordinance of State convention, as affecting right of appeal.*—The ordinance of the State convention, No. 26, adopted on the 28th September, 1865, by which judgments and decrees rendered after the 11th day of January, 1861, were ratified, expressly declares that such ratification is "subject to the right of appeal according to law"; and this exception or restriction applies to appeals granted by subsequent statutes, as well as by the statutes then of force.

APPEAL from the Probate Court of Russell.

IN the matter of the estate of Matthew Matthews, deceased, on the application of Milton J. Moore, the administrator, for an order to sell the real estate for the purpose of making a fair and equitable division among the heirs-at-law. The petition was filed on the 21st September, 1864. An order for the sale of the lands was made on the 14th November, 1864. The sale was made under the order, and was reported to the court on the 1st December; but the court refused to confirm it, and ordered a re-sale. A second sale was made on the 2d January, 1865, which was reported and confirmed on the 9th January, 1865. On the 25th June, 1866, Mrs. Rutha F. Page, who was one of the distributees, and John R. Page, her husband, sued out an appeal from the order of sale. A motion to dismiss the appeal was submitted on the part of the administrator, on the ground that the appeal was barred by the statute of limitations.

STONE, CLOPTON & CLANTON, for the motion.

RICE, SEMPLE & GOLDTHWAITE, and GEORGE D. & G. W. HOOPER, *contra*.

A. J. WALKER, C. J.—The decree of the probate court in this case was rendered on the 14th November, 1864. The appeal was taken on the 25th June, 1866; and a motion is made to dismiss it, upon the ground that it is barred by the statute of limitations.

On the 21st February, 1866, an act was approved, which is in the following words: "From any decree or judgment of the court of probate, rendered since the 11th day of January, 1861, and prior to the 25th September, 1865, any person having an interest therein, and aggrieved thereby, may appeal therefrom, in the manner, and to the circuit or supreme court, as now prescribed by law, at any time within six months after the passage of this act." This appeal is embraced within this law, and is authorized by it. Its effect is sought to be avoided by the argument, that the appeal was barred before the passage of the law, that the preclusion of an appeal by the statute of limitations was a vested right, and that it was incompetent for the legislature to take away such vested right by a restoration of the appeal.

The argument fails in consequence of the incorrectness of the proposition, that the bar of the statute of limitations is a vested right. The precise question was involved in *Jones v. Jones*, (18 Ala. 248,) where it was decided, that a bar completed in favor of the defendant, under the laws of another State, in which he had resided, was not available to him in this State, after his removal to it. If the bar were a vested right, it would accompany its possessor whithersoever he might go, and certainly could not be lost by a removal into another State. A collection of authorities upon the subject will be found in Angell on Limitations, ch. viii; and see section 66, note 3. Judge Story at one time, looking to reason rather than precedent, seemed to favor the proposition, that there was a vested right in the bar; but it was yielded, and the supreme court of the United States have rejected it in several cases.

2. It is contended, also, that the decree is ratified by the

ordinance of the convention adopted on the 28th September, 1865, (No. 26,) and that it therefore can not be the subject of an appeal. The ratification is expressly made subject "to the right of appeal," and therefore the right of appeal can not be excluded by the ordinance. We can find no reason to support the argument that the right of appeal, to which the ratification is subordinated, refers to the statutes then existing and giving appeals. The language is as well adapted to embrace appeals under subsequent statutes, as under those then existing.

The establishment, repeal, or alteration of the law of limitation, as to time of appeals to the supreme court, is not referrible to an authority to affect the jurisdiction of this court, as established by the constitution. The concession of a legislative power to increase or abridge the jurisdiction of this court, as established by the constitution, is not made, or intended to be made, in this opinion. The jurisdiction of this court is exercised "under such restrictions and regulations * * * as may * * * be prescribed by law." The fixing and altering of the period of limitation to appeals is but an exercise of the power to regulate the jurisdiction of this court, not the assumption of a control over it.

When the statute of limitations operates to vest a title to property in the adverse possessor, a different principle from that which is announced in this opinion may apply; and we do not wish to be understood as deciding, that a title to property, resulting from adverse possession, could be divested by any act of legislation.

The motion to dismiss the appeal is overruled.

WRIGHT ET AL. *vs.* MAY ET AL.

[CREDITORS' BILL TO SUBJECT LANDS FRAUDULENTLY CONVEYED.]

1. *Premature submission of cause on pleadings and proof; dismissal without prejudice.*—When a cause is prematurely submitted on pleadings and proof, service of process not having been perfected on one of the defendants, who is a necessary party to the bill, or the cause not being at issue as to him, the chancellor may set aside the submission, and require the necessary proceedings to be had to bring the cause regularly to a hearing, or he may dismiss the bill; but the dismissal in such case should be without prejudice, if the evidence shows that the plaintiff has a substantial cause of action.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. WADE KEYES.

THE original bill in this case was filed, on the 28th August, 1857, by Robert R. Wright, Robert B. Smyth, and William Wright, as creditors of James Williams, deceased, against the personal representative of said Williams, S. S. May, John C. Lassiter, Benjamin Kelly, John W. Burns, and William L. Williams; and sought to subject to the satisfaction of the complainants' several debts a town lot in Greenville, which had been once sold under execution against said James Williams, and purchased at the sale by the complainant Smyth; and which, as the bill alleged, was afterwards redeemed by said Williams, in the name of said William L. Williams, who was his brother, and a conveyance taken to said William L. Williams. The bill alleged, that the redemption was effected with funds which belonged to said James Williams, and that the conveyance was fraudulently intended to hinder and defeat the claims of his creditors. The bill further alleged, that S. S. May was in possession of the lot, and claimed title to it, and had rented a portion of it to the defendants Kelly and Lassiter; and that the defendant Burns was in possession, and claimed title to another portion of it. In the statement of the defendants' names and residences, it was averred that William

L. Williams was a convict in the penitentiary ; and process of subpcena was prayed against all the defendants. The subpcena was returned executed on the defendants Burns, May, Kelly, and the administrator of James Williams, on the 31st August, and on Lassiter on the 28th September, 1857 ; and on the 9th November following, a decree *pro confesso* was entered against all the defendants, which recites that they had been served with process for more than thirty days, and had failed to answer. At the May term, 1858, the decree *pro confesso* was set aside as to the defendant May, and permission was granted to him to file an answer ; and on the 15th November, 1858, he filed an answer, requiring proof of the material allegations of the bill, and claiming to be a purchaser for valuable consideration without notice. On the same day, an order was made by the chancellor, in passing on a demurrer to the bill, allowing the complainants to amend by making it a general creditors' bill. The bill was accordingly amended, and the defendants were required to answer the amendment ; but the record does not show when the amendment was made. A decree *pro confesso* on the amended bill, against all the defendants, is next copied in the transcript, but it is without date. On the 24th January, 1859, publication was ordered against William L. Williams and Kelly, as non-residents ; but the record does not show that the publication was ever made. At the May term, 1859, the cause was submitted for final decree, on pleadings and proof, but the submission was afterwards set aside. At the November term following, it was again submitted ; when the chancellor rendered a decree dismissing the bill, but not assigning any reasons for his decree. The chancellor's decree is now assigned as error.

WATTS, JUDGE & JACKSON, and B. F. PORTER, for the appellants.

BAINE & NESMITH, and ADAMS & HERBERT, *contra*.

BYRD, J.—Upon the allegations of the bill, William L. Williams is an indispensable party ; and although the bill prays that he be made a party defendant, yet it does not

appear from the record that he was ever served with process to answer the bill. It does appear that, on the 24th January, 1859, the register made an order of publication against him; but it does not appear that the order was ever complied with, or that any further action was ever taken upon it. The cause was submitted for a final decree, on the pleadings and proofs; and the chancellor dismissed the bill, without assigning any reason therefor. In the state of the pleadings, the court did not err in dismissing the bill. The cause was prematurely submitted. The court could have set aside the submission, and required Williams to have been made a party, before proceeding to a final decree. But the court is not bound to protect a party against a premature submission of his cause.

We have looked into the merits of this cause, upon the pleadings and proofs; but, without intimating an opinion upon them, we are of opinion that the chancellor should have dismissed the bill without prejudice to the right of the complainant filing another bill. And in conformity to the established practice of this court, a decree is here rendered, reversing the decree of the chancellor, and rendering a decree dismissing the bill without prejudice; and the appellant must pay the costs of this court and the chancery court.—*Wilkins & Hall v. Wilkins*, 4 Porter, 245; *Burns v. Hudson*, 37 Ala. 62, and cases cited therein; *Taliaferro, adm'r v. Branch Bank of Montgomery*, 23 Ala. 757.

JUDGE, J., not sitting, having been of counsel in the cause.

NOTE BY REPORTER.—After the delivery of the foregoing opinion, the appellants asked and obtained a *certiorari*, returnable *instanter*, to perfect the record. The register, in his return to the *certiorari*, stated that there was no citation or subpoena in his office showing that service was ever perfected on the defendant William L. Williams, nor anything else, except an entry on his trial docket, signed by the warden of the penitentiary, which stated that the subpoena was executed by serving a copy on said Williams, who was a convict in the penitentiary, on the 2d September, 1857. The cause being again submitted, the following opinion was afterwards delivered:

BYRD, J.—The return to the *certiorari* does not relieve the case from the objections taken in the former opinion. The return copied from the trial docket is not sufficient to prove the service of the subpoena, when it is evident that the court below did not treat it so, as appears by the appellants' applying in January, 1859, for an order of publication against William L. Williams, to answer "the bill and amended bill," which was granted, and was never perfected; or, if so, the record does not show the fact. But, even if a subpoena had been served, or the publication perfected, still the record fails to show that the cause was ever at issue on the amended bill as to said Williams. There is no answer by him on file, nor any decree *pro confesso* against him on the bill as amended.

Let the former judgment-entry made at this term be re-entered.

HAWKINS vs. NELSON.

[DETINUE FOR HORSE.]

1. *Capture of private property on land in time of war.*—The general principle of international law, to which there are admitted exceptions, is now universally acknowledged, that private property on land is exempt from capture and confiscation in war; and this principle was recognized by the government of the United States during the late war, in the published orders of its authorized officials, however much it may have been disregarded or abused in the operations of its armies in the field.
2. *Same; burden of proof.*—Where it appears that the horse in controversy was forcibly taken by the United States army during the war, from the possession of the defendant, to whom it belonged, and who was a non-combatant; was branded as government property, and carried into another county, where it was abandoned, and left on the plaintiff's premises, and was afterwards peaceably regained by the defendant, without the knowledge or consent of the plaintiff; the plaintiff cannot recover in detinue, without showing affirmatively that the capture was authorized by the laws of war, as recognized by the United States government in the published orders of its authorized officials.

APPEAL from the Circuit Court of Walker.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by Nathaniel Hawkins, against Isaac S. Nelson, to recover a horse, together with damages for his detention ; and was commenced on the 19th February, 1866. "On the trial," as the bill of exceptions states, "the evidence showed that, on Tuesday, the 28th day of March, 1865, the horse sued for was the property of the defendant, and was in his possession in said county, and was forcibly taken from his possession, on that day, by the United States army under the command of General Wilson; that the horse, after being seized as above stated, was carried by said army to Elyton in Jefferson county, was branded 'U. S.', in the usual manner in which government horses are branded, and was left by said army in the plaintiff's lot, on the Saturday next after the said seizure ; that the plaintiff claimed and used said horse, from that time, as his own, and continued in the possession of it until September, 1865, when it was taken from his possession, without his knowledge or consent, by the defendant. It was shown, also, that the horse was in the defendant's possession at the commencement of the suit, and was worth one hundred and twenty-five dollars; and that the defendant had resided for many years in said county, and was a non-combatant. There was no evidence tending to show that the defendant had afterwards acquired any title or possession to the horse, from any source whatever after it was taken from him as above stated, except the possession which he thus acquired in September, 1865 ; nor was there any evidence tending to show that the plaintiff, after he acquired possession as above stated, ever parted with any right or title which he thereby acquired.

"Upon this evidence, the court charged the jury, that if the horse sued for was the property of the plaintiff on the 28th March, 1865, and was forcibly taken from his possession, on that day, by the army of the United States ; and that the defendant had never parted with his title or possession, otherwise than by the capture or seizure by the United States army, as set forth above in the state-

ment of the evidence,—then they must find a verdict for the defendant. The plaintiff excepted to this charge, and requested the court to instruct the jury, that if the horse was taken from the defendant by the army of the United States, on the day, and in the manner set forth in the evidence, and was branded by said army, and was left by them in the plaintiff's lot, and was kept, and claimed, and used by him, as his own, until the September following, and was in the defendant's possession at the commencement of the suit,—then the plaintiff would be entitled to recover, unless there was evidence before them to satisfy them that he had voluntarily parted with the possession, or with the title he had thus acquired. The court refused to give this charge, and the plaintiff excepted."

The refusal of the charge asked, and the charge given by the court, are now assigned as error.

PORTER & MARTIN, for appellant.

RICE, SEMPLE & GOLDTHWAITE, *contra*.

JUDGE, J.—In the general operations of war, it is now the true and universally acknowledged rule of the law of nations, that private property, *on land*, is exempt from capture and confiscation.—Gardner's Institutes, 612. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country.—Wheaton's Int. Law, 346–7. And eminent publicists contend, that "the moral sense of mankind will soon compel all christian nations to abstain from pirating on private property and persons non-combatant, *at sea*, as well as *on land*. The principles of the gospel—the basis of public law—require that war by sea and land should respect private persons and property."—Gardner's Institutes, 619.

But to the general rule of international law above stated, there are exceptions. Private property may be taken from enemies in the field, or in besieged towns, or by levies of military contributions, or when it is contraband of war, or necessary for supplies or military purposes.—See note by Dana to Wheaton's International Law, and authorities therein cited, on page 347.

During the progress of the recent war in the United States, the general rule above stated was recognized by that government in the *published orders* of its authorized officials, however much it may have been disregarded or abused in the operations of armies in the field. In General Orders No. 107, from the war department, of date August 15, 1862, issued by command of Major-General Halleck, then "General-in-chief of the army", the following paragraph occurs: "III. The laws of the United States, and the general laws of war, authorize, in certain cases, the seizure and conversion of private property, for the subsistence, transportation, and other uses of the army; but this must be distinguished from pillage, and the taking of property for *public* purposes is very different from its conversion to *private* uses. * * * The 52d article of war authorizes the penalty of death for pillage or plundering", &c. And an order of the president of the United States, issued from the war department, on the 16th of August, 1862, contains the following: "*First*—Ordered, that military commanders, within the States of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas, in an orderly manner, seize and use any property, real or personal, which may be necessary or convenient for their several commands, as supplies, or for other military purposes; and that, while property may be destroyed for proper military objects, none shall be destroyed in wantonness or malice."

Whether the wholesome injunction against the destruction of property "in wantonness or malice", was in all cases observed, it were needless now to inquire. The horse which is the subject of this suit, was the private property of a non-combatant, and, *prima facie*, not liable to capture. It does not appear from the record, that any evidence was introduced by the plaintiff in the court below, on whom was the burden of such proof, showing that the capture was within any one of the exceptions to the general rule above laid down, or that it was authorized by any military commander, under the laws of the United States and the general laws of war. The horse having been abandoned by those who took him, the rightful owner, under the circumstances, was

authorized peaceably to re-possess himself of the property.

It follows that the circuit court did not err in the charge given to the jury, nor in the refusal to charge as requested.

Judgment affirmed.

FORRESTER *vs.* FORRESTER'S ADM'RS.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *What may be assigned as error.*—On appeal from a decree rendered on the final settlement of an administrator's accounts and vouchers, errors cannot be assigned on an order, made at a previous term, confirming his report of a sale of the land.
2. *Presumption in favor of judgment.*—In a probate case, where there is no bill of exceptions, and the evidence which was before the court is not set out in the decree, if the record shows that the court had jurisdiction of the subject-matter and the parties, the appellate court will presume that its decision on a question of fact was justified by the evidence.

IN the matter of the estate of William Forrester, senior, deceased, on final settlement of the accounts and vouchers of William Forrester, junior, and David Spradling, as administrators. The record shows that special letters of administration were first granted to said administrators, and afterwards general letters of administration; but it does not show the date of either of said appointments. It further shows that, on the 20th June, 1859, the court granted an order, on the application of said administrators, authorizing them to sell the decedent's real estate for the purpose of making an equitable division among the heirs-at-law; that the administrators made their report of the sale, on the 30th August, 1859, [stating that said William Forrester, jr., had become the purchaser; and that said sale was confirmed on the 12th September, 1859. On the 17th February, 1864, the administrators filed their accounts and vouchers for a final settlement; and the settlement was

made on the 28th December, 1864, when the following decree was rendered :

"This day, to which time this cause has been continued, came William Forrester, jr., and David Spradling, administrators of the estate of William Forrester, sr., deceased, in their own proper persons, and by their attorneys, and also E. A. Powell, guardian *ad litem* for Martha Gaston, a minor; and the account and vouchers heretofore filed in this court for a final settlement of said estate being examined, and the court being satisfied that the notice required by law and the former order of this court had been given for three successive weeks notice in the *Tuskaloosa Observer*, a newspaper published in said county; and no objection having this day been made against said account and vouchers, and they appearing to the court to be equitable and just: It is ordered and decreed by the court, that said account and vouchers be allowed, and recorded, and filed in this court. By said account and vouchers it appears, that said administrators had received, and are chargeable with, the sum of six thousand one hundred and eighty-two dollars and forty-four cents; and that they are entitled to credits to the sum of twelve hundred and ninety-six 86-100 dollars; which leaves in the hands of said administrators the sum of four thousand eight hundred and eighty-five 58-100 dollars. From the statement made upon oath by the administrators, as to who are the heirs and distributees of said estate, the evidence on file, and the proceedings heretofore had in this court, the court is of the opinion, and so decides, that the persons named in the petition of Sarah Forrester for dower are the heirs and distributees of said estate of William Forrester, sr., deceased. It further appearing that, including the widow, said Sarah Forrester, there are four original distributees, the share of each will be the sum of one thousand two hundred and twenty-one 39-100 dollars. It is therefore ordered and decreed by the court, that said William Forrester and David Spradling, administrators of the estate of William Forrester, sr., deceased, pay to Sarah Forrester, widow of said decedent, the sum of one thousand two hundred and twenty-one 39½-100 dollars, her distributive share of said estate. It is

further ordered, that said administrators pay to George Forrester the sum of one thousand two hundred and twenty-one $39\frac{1}{2}$ -100 dollars, his distributive share of said estate. It is further ordered, that said administrators pay to John M. Curry, William D. Curry, and Mary Welsh, wife of Franklin Welsh, children of Mary Curry, deceased, who was a daughter of said William Forrester, deceased, the sum of one thousand two hundred and twenty-one $39\frac{1}{2}$ -100 dollars, the same being four hundred and seven dollars and thirteen cents each. It is further ordered, that said administrators pay to Harriet A. Bond, wife of W. D. Bond, Amanda McMichael, wife of James M. McMichael, and Matthew Gaston, children of Agnes Gaston, deceased, also a daughter of William Forrester, sr., deceased, the sum of one thousand two hundred and twenty-one $39\frac{1}{2}$ -100 dollars, their distributive share of said estate, the same being four hundred and seven dollars and thirteen cents for each share. And it appearing to the court that said administrators had not used the funds of said estate for their own use, or the benefit of either of them, from the affidavit filed in court, said administrators proposed to settle the several decrees by depositing Confederate treasury-notes with the judge of this court, the same description of money received by them, as they asserted. Whereupon it is ordered by the court, that said administrators pay the several decrees, in the same description of money received by them for said estate. Whereupon, the said William Forrester, jr., and David Spradling, administrators as aforesaid, deposited with the judge of this court the sum of four thousand eight hundred and eighty-five dollars and fifty-eight cents in Confederate treasury-notes, for which receipts were given as a satisfaction of the foregoing decrees."

The present appeal is sued out by George Forrester, who assigns as error—1st, the order confirming the sale of the lands; 2d, "the final decree, and receiving Confederate treasury-notes in satisfaction"; and, 3d, "entering satisfaction of the decree."

W. R. SMITH, and W. MOODY, for appellant.

C. M. COOK, *contra*.

BYRD, J.—1. There is no bill of exceptions. The appeal was taken from the decree made on the final settlement of the administration of appellees upon the estate of William Forrester, deceased, and not from the confirmation of the report of the sale of the land made in 1859, as is evident from the certificate of the probate judge. The appellants have assigned error upon the order of confirmation; but there being no joinder in error, nor any appeal from such order, this court will not notice that assignment.

2. There being no bill of exceptions taken on the hearing of the final settlement of the administration, and the evidence not being set out upon which the court rendered its decree, we will not reverse, if the court had the authority, under any state of proof that could be presumed, to render the decree it did. We perceive nothing in the decree which the court had not the jurisdiction to determine, and its decree is affirmed upon the authority of the following cases: *Burchfield v. Cook*, and *Watson and Wife v. Stone*, decided at the present term; *Smith's Distributees v. King*, 22 Ala. 558; *Williams and Wife v. Gunter*, 28 Ala. 681; *Reese v. Gresham*, 29 Ala. 91. It devolves on the appellant to show error affirmatively; and this cannot be done on an issue of fact, in the absence of the evidence. On such an issue, every reasonable intendment will be indulged to sustain the decision of the court below; and, therefore, where the evidence is not set out, we must presume that the court had sufficient proof to authorize the decree, where it has the jurisdiction to render the particular decree, or matter thereof, complained of and assigned as error.

Let the decree be affirmed.

GUNTER *vs.* WILLIAMS AND WIFE.

[BILL IN EQUITY BY PURCHASER AGAINST VENDORS FOR DAMAGES ON ACCOUNT OF BREACH OF COVENANTS OF WARRANTY.]

1. *Deed executed by partner in partnership name.*—A deed, or other instrument under seal, executed by one partner in the partnership name, if subsequently ratified by the other partner, is binding on both from its date; and such subsequent ratification may be by parol, and may be proved by parol.
2. *Competency of vendor or mortgagor, as witness for purchaser or mortgagee.*—Where lands are mortgaged by a debtor for the indemnity of his surety, and are afterwards found to be subject to a former vendor's lien; and the mortgagee, having paid the debt, files a bill in equity against the mortgagor's immediate vendor, to recover damages for a breach of the covenants of warranty running with the land,—the mortgagor, not being bound by any covenants or warranty, is not a necessary party to the bill, and is a competent witness for the mortgagee.
3. *Covenants of warranty running with land.*—The covenants of warranty in a deed for land, in the usual form, run with the land; and an action for a breach may be brought in the name of the assignee.
4. *What constitutes breach of covenants of warranty*—If the purchaser yields possession to a paramount title, he may maintain an action for a breach of the covenants of warranty in his deed, though there has been no ouster by action at law.
5. *When assignor and assignee may join in bill.*—Where lands are sold under mortgage, and are found to be subject to a former vendor's lien outstanding against the mortgagor's vendor; and thereupon the purchaser at the sale, in consideration of being released from his purchase, conveys by deed, without warranty, to the mortgagee, all his interest in the land, together with all damages resulting to him from the breach of the covenants of warranty running with the land, and all right of action for the same at law or in equity,—he may be joined with the mortgagee, as a nominal plaintiff, in a bill which seeks to enforce the claim for such damages.
6. *Separate estate of wife; how charged.*—A married woman, owning a separate estate secured to her by deed, may bind or charge it by any contract, to the same extent as if she were sole and unmarried; and if she joins with her husband and trustee in the execution of a deed for land, her separate estate is bound by the covenants of warranty.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed on the 11th May, 1858, by Charles G. Gunter, George T. Gunter, and Wynn B. Gowen, as surviving partner of the late firm of W. B. Gowen & Co., (the two latter suing for the use and benefit of said Charles G. Gunter,) against John D. F. Williams, and Emily, his wife; but the bill was afterwards amended by striking out Gowen's name as a party plaintiff. Its object was to enforce a claim for damages, resulting from an alleged breach of the covenants of warranty contained in a deed for lands, which was executed by said Williams and wife to said W. B. Gowen & Co.; and to subject to its satisfaction property belonging to Mrs. Williams' separate estate, secured to her by ante-nuptial contract. The land was situated in the city of Montgomery, and was sold and conveyed by L. W. Pond, by deed dated the 8th July, 1850, to said John D. F. Williams, "as trustee, in trust for the sole and separate use of the said Emily Williams, under the powers, trusts, and conditions set forth in a deed of marriage-settlement executed between the said John D. F. and Emily Williams before their marriage, and to which George T. Walker, as trustee, was a party, dated the 4th January, 1850, and to which reference" was made as part of the deed; the consideration recited in the deed being the present payment of the sum of sixteen hundred dollars, by the said John D. F. Williams, as trustee for his wife. On the 5th April, 1851, Williams and wife sold and conveyed the land to said W. B. Gowen & Co.; the deed reciting as its consideration the payment of twenty-one hundred and thirty-one dollars, and containing the usual words of conveyance, "grant, bargain, and sell"; the *habendum* clause and covenants being in the following words: "To have and to hold the same to the said parties of the second part, their assigns and heirs forever; and the said parties of the first part do hereby covenant to and with the said parties of the second part to warrant and defend *this* (?) title against the just and lawful claims of all persons whomsoever." On the 18th August, 1851, W. B. Gowen & Co. executed a deed, by which they conveyed said land to Charles G. Gunter, to secure and indemnify him against liability as their surety on a bill of exchange and promis-

sory note, which were payable, respectively, on the 1st November, 1851, and the 15th January, 1852. The mortgage contained no power of sale; but, on the 7th June, 1852, Lewis B. Pope, who, with said W. B. Gowen, composed the said firm, executed and delivered to said Gunter an instrument under seal, in the partnership name, which, after reciting the execution and purposes of the mortgage, and the fact that it contained no power of sale, authorized said Gunter to sell the premises conveyed, and to apply the proceeds to the payment of the note and bill.

Williams in fact paid only four hundred dollars of the purchase-money due to Pond, and gave his three promissory notes for the balance; and he and his wife executed a mortgage, or deed of trust on the land, with power of sale, to secure their payment. Gowen & Co. also failed to pay eight hundred dollars of the purchase-money due from them to Williams and wife. Gunter, having paid the promissory note and bill of exchange on which he was bound as surety for Gowen & Co., advertised the land for sale under his mortgage and power of sale; and it was thereupon agreed between Williams, Gunter, and Gowen Co., that the purchaser at the sale should assume the eight hundred dollars which Gowen & Co. owed to Williams and wife, and should pay it to Pond as soon as Williams and wife paid the balance due on their purchase, thus perfecting the title. This agreement was publicly announced at Gunter's sale, which took place on the 4th November, 1853; at which sale, George T. Gunter became the purchaser, at the price of sixty dollars, in addition to the eight hundred dollars assumed to be paid as above stated. On the 1st May, 1854, Thomas Welsh, as administrator with the will annexed of said L. W. Pond, filed his bill in the chancery court at Montgomery, to subject the land to the payment of the notes for the purchase-money given by Williams, under the mortgage executed by Williams and wife. In August, 1857, the chancellor rendered a decree in said cause in favor of the said Welsh, and ordered a sale of the land by the register under the mortgage. The sale was made under the decree in November, 1857, and was confirmed by the chancellor at the ensuing January term, 1858; but the price brought at

the sale was not sufficient to discharge the mortgage debt. The register made a deed to the purchaser, and, as an amendment to the bill in this case alleged, "the land was soon thereafter yielded up by the complainant to the purchaser, and said purchaser took possession of the same under his deed."

George T. Gunter paid the sixty dollars bid by him at the sale under Charles G. Gunter's mortgage, and after the subsequent sale under Pond's mortgage, Williams and wife having failed to pay the balance of the purchase-money due from them to Pond, he demanded to be released from his purchase. Charles G. Gunter accordingly repaid the sixty dollars, and agreed to release him from his purchase; and he thereupon executed to said Chas. G. Gunter an instrument under seal, dated the 1st May, 1858, which, after reciting the several conveyances and sales above mentioned, proceeded thus; "In view of the failure of the said John D. F. and Emily Williams to discharge the lien on said lot of land, to said Pond or his administrator, and of the sale of said land on account thereof under the order and decree of said chancery court, I, the said George T. Gunter, have desired the said Charles G. Gunter to refund me the sixty dollars paid by me to him at his said mortgage sale, and to be released from the payment of the eight hundred dollars, which, by the conditions of said sale, the purchaser of said lot was to pay; and now, in consideration of the consent of said Charles G. Gunter to refund me the said sum, and to discharge me from said obligation, I do hereby release and confirm unto the said Charles G. Gunter all the right, title, interest, and claim, which I have in and to said lot of land, acquired under and by virtue of my purchase at said mortgage sale of said lot of land, and the conveyance thereof to me by deed from said Gunter, as trustee and mortgagee, on the 4th November, 1853; and I herein, for the considerations named above, do particularly assign and transfer to said Gunter all the damages sustained by me, and to which by law I am entitled, for the breach of the covenants of warranty in the deed to said land from said J. D. F. and Emily Williams to said Gowen & Co., or of the deed from said Gowen & Co. to said Charles G. Gunter, and

all the right of action, in law or equity, that I may have in and from the same. In witness whereof," &c.

The prayer of the bill was for an account, or issue at law, to determine the damages resulting from the breach of the covenants of warranty in the defendants' said deed; that Mrs. Williams' separate estate might be subjected to the payment of the sum so ascertained, her husband being insolvent; and for other and further relief according to the nature of the complainants' case.

The defendants demurred to the bill, 1st, for want of equity; 2d, for misjoinder of complainants; 3d, because the bill did not show any breach of the covenants contained in the defendants' deed; 4th, because it did not show that the complainants had sustained any damage from a breach of said covenants; and, 5th, because the facts alleged in the bill did not show that Mrs. Williams created a charge on her separate estate by the covenants in her deed. In passing on the demurrer, the chancellor delivered the following opinion:

CLARK, Ch.—“This cause came before the court at the last term, and was submitted on the demurrer of the defendants, without argument, and then stood over for consideration in vacation. The object of the bill is to charge the separate estate of the wife with the damages which have been sustained by the breach of covenant of warranty, in a deed of conveyance by her and her husband, of certain real estate in the city of Montgomery, to the plaintiff Gowen and another as partners. The demurrer is on several grounds; and from the importance of the case, the counsel on both sides would have been authorized to have argued the questions presented; and certainly the court would have been profited by argument. I have considered the last ground of demurrer first—*namely*, that the facts set forth do not show that Mrs. Williams created by the covenants in the deed a charge upon her separate estate.

“From the allegations of the bill, that the property was secured to the sole and separate use of Mrs. Williams, free from the control and disposition of her husband, it is clear, under the decisions of the supreme court, based upon those

of the English chancery, that she retained all the power and control over her separate property, that she had before the marriage; and it cannot be disputed that, as a single woman, she could have sold and conveyed lands with covenant of warranty as to title, or she could have united with John D. F. Williams, or any one else, in a covenant of warranty of title. Then, if she could have incurred those liabilities while unmarried, what would hinder her from doing so when married? I understand the law to be, that when a married woman, who has a separate estate, executes a bond, or other obligation, or makes any contract, which, if she were single, could be enforced against her at law, a court of equity will infer, without express declaration by her, that she intended to charge her separate estate in equity with its payment or performance; and so strong is the inference, that the court will not permit her to deny, in the absence of fraud or undue influence, that she did intend so to charge. The insolvent condition of the husband, and he stating in the conveyance that he made it as trustee, tends to show that the sale and conveyance of the real estate was that of her separate property. But, as I have already said, this can not be material, because a court of chancery will hold her to the consequences of her act.—See *Collins v. Rudolph*, 19 Ala. 616; *Murray v. Barbee*, 3 Mylne & Keene, 209; *Hulme v. Tenant*, 1 Brown's C. C. 16; *S. C.*, 1 Leading Cases in Eq. 389, and the note thereto; *Bell & Terry v. Keller*, 13 B. Monroe, 384; *Vanderheider and Wife v. Mallory & Hunter*, 1 Comstock, 452; *Yale v. Dedener*, 21 Barbour, 286; and *Boarman v. Groves*, 23 Miss. 280.

“That a married woman, having a separate estate, can charge it with the breach of her covenant in a deed of conveyance, has probably never been decided; but I can see no reason why she cannot, and every reason why she can. If she can make a bond that would be a charge, she can as well make a covenant in a conveyance; and I can have no doubt that this a proper charge against the separate estate of Mrs. Williams, provided there has been a breach of the warranty.—*Falmouth Bridge Co. v. Tillotts*, 16 B. Monroe, 637-642.

"2. I will, therefore, now address myself to the consideration of the ground of demurrer, that the bill fails to show that there has been any breach of the covenants in the deed. It alleges, that Pond, the vendor of the defendants, retained a vendor's lien; and that subsequent to their conveyance to Gowen & Co., and indeed to the sale under the mortgage, that his administrator enforced the lien against the defendants in this suit, and obtained a decree from the Montgomery chancery court, to have the premises sold for its satisfaction, and had such decree executed; and that the lands were purchased by a third person, and the sale confirmed by the court; but it does not allege that the plaintiffs have either been removed from the possession, or submitted to the decree. The decisions of the supreme court—namely, *Dupuy v. Roebuck*, 7 Ala. 484; *Davenport v. Bartlett & Waring*, 9 Ala. 179; and *Griffin v. Reynolds*, 17 Ala. 198—*perhaps* require, that the plaintiffs should have alleged that they were *ousted*, or yielded the possession to the purchaser at the register's sale; but, as they have stated that the equitable lien, which had been reserved, was asserted against the land, the premises sold to satisfy such lien under a decree in chancery, to which the defendants were parties, and such sale confirmed, I have come to the conclusion, that the necessity of an averment of an actual ouster, or yielding to the sale under the decree, could not be essential.—See *Hanson v. Buckner's Devisees*, 4 Dana, 251, 254; and *Martin v. Martin*, 1 Dev. Law Rep. 413.

"3. This being the case, do the plaintiffs, as the demurrer of the defendants in their next ground insists, fail to show that they have sustained any injury? Leaving out of view, as I think I ought, that Charles G. Gunter paid on the mortgage debts over four thousand dollars, there can be no doubt that the defendants were liable to make good at least the consideration expressed in the deed, less the eight hundred dollars, to some one. If Gowen & Co. had continued to hold the premises, unincumbered with the mortgage, until the breach of the covenant by the decree and sale, the liability would have been to them; and when they made the mortgage, whether it is treated as a mere security, or conveyance of the fee upon condition, it can not be less

than an express lien, which could not be discharged but by payment of the mortgage debt. But, when the mortgagee sold under the power, his sale vested the entire interest, both of himself and of the mortgagors, in the purchaser. This sale was as effective, in the absence of fraud, to divest the title out of the mortgagee and mortgagors, and vest the same in the purchaser, as a sale under a decree of a court of chancery would.—*Kinsly v. Ames*, 2 Metcalf, 29; *Wilson v. Troup*, 2 Cowen, 193, 230.

“This being the case, it follows that the entire interest, whatever it was, in the lands, with the covenants which run with the land, embraced in the conveyance of the defendants to Gowen & Co., vested in the purchaser at the mortgagee’s sale. That sale was an assignment by the mortgagors, through their agent or trustee, the mortgagee, to the purchaser, of the unbroken covenant of warranty made by the defendants to them, and authorized him, or his assignee, to sue for and recover the damages thereon, if afterwards broken.—*White v. Whiting*, 3 Metcalf, 8; *Tufts v. Adams*, 8 Pick. 547; *McCrary v. Brishend*, 1 Nott & McCord, 104. See, also, *Claunch v. Allen*, 12 Ala. 159.

“That covenants running with the land may be sued on, when broken, by the assignee of the lands, was decided as far back at least as *Spencer’s case*, (5 Coke, 16;) and it has been recognized and affirmed by the supreme court of almost every State in the Union.—See 1 Smith’s Leading Cases, (ed. 1855,) 115, &c.; *Watley v. Munford*, 5 Cowen, 137; and *Lot v. Parish*, 1 Littell, 394. Nor is it necessary that the assignee should be one with warranty.—*Cummins v. Kennedy*, 3 Littell, 118; *Beddoe’s Executor v. Wadsworth*, 21 Wend. 120.

“If, then, George T. Gunter, at the mortgagee’s sale, purchased and paid sixty dollars, and received a deed from the mortgagee, and afterwards lost the land by Pond’s superior lien, he sustained damages to at least the amount of sixty dollars. But I apprehend, if he, under the sale by the mortgagee, because the assignee of the covenant of warranty, he would not be restricted in his recovery to the amount of money he paid for the land; but would be entitled to recover whatever his assignor could have

recovered, had no such mortgage sale been made. It is, however, not necessary to determine, what shall be the extent of the relief. It is sufficient to say, that if he has lost sixty dollars, to that extent he has been injured, and can not be deprived of relief.

"4. To return, then, to the question of misjoinder of plaintiffs. To authorize a party to be made a plaintiff, he must have some right to a decree in his favor, or be liable in some way to indemnify some one else, who is associated with him, or be possessed of the legal title, while some other plaintiff has the equitable.—See *Moore v. Moore*, 17 Ala. 631; and *Williams v. Judge*, 14 Ala. 135. Apply this rule to the plaintiff Gowen. The sale of the mortgagee divested all interest out of him, both legal and equitable, in both the lot of land and the covenants running therewith; and as his mortgage conveyance to Chas. G. Gunter was without covenants, there was no liability upon him to indemnify the purchaser at the mortgagee's sale, and, consequently, there did not remain a *scintilla juris* in him, and there was, therefore, no ground to make him a party. If there had remained a spark of right or liability, he would have been a proper party.—*Keith v. Day*, 1 Ver. 660, 671; 8 Cowen, 201; 1 Smith's Leading Cases, 164.

"5. But I apprehend the position of the Gunters is quite different. George T. Gunter could have filed a bill, as soon as he was deprived of the premises by the decree of the court of chancery, and could have at least had a decree for the sixty dollars paid by him; but this right to relief had then ceased to be a covenant running with the land, and became a *mere chose in action*, and assignable as such.—*Beddoe v. Wadsworth*, 21 Wend. 120, 123; 1 Smith's Lead. Cases, 163. This being the case, without considering whether the effect of the deed of release and assignment from him to Charles G. Gunter was to vest the latter with the legal title or not, or but the transfer of an equitable interest under the English practice, (as laid down in *Daniell's Ch. Pr.* 248,) and the decision of the supreme court in *Blevins v. Buck*, (26 Ala. 292,) I shall hold that they are both proper parties; and therefore the demurrer for the misjoinder of these two plaintiffs cannot be allowed. The

case must, however, stand over for an amendment of the bill by striking out the name of Gowen. And here I will say, it might be well for the solicitors for the plaintiffs, if their case will justify it, to amend their bill by stating that they yielded to the title of the purchaser at the register's sale."

The bill having been amended, by striking out the name of Gowen as a plaintiff, and adding an allegation of the surrender of possession, the demurrer was overruled. A joint answer was afterwards filed by the defendants, admitting the material allegations of the bill as to the several sales and conveyances; but they denied that Mrs. Williams' deed created, or was intended to create, any charge on her separate estate; or that there had been any breach of the covenants in the deed; or that the complainants had surrendered the possession of the land to the purchaser at the register's sale; and they set up some other matters, which require no special notice.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, on the ground that the complainants had failed to prove the execution of the power of sale from W. B. Gowen & Co. to Charles G. Gunter; and his decree is now assigned as error.

ELMORE, KEYES & GUNTER, and JONA. HARALSON, for appellant.

PETTUS & DAWSON, *contra*.

A. J. WALKER, C. J.—Proof of the execution of the power of sale given by W. B. Gowen & Co. is an indispensable pre-requisite to a decree for the complainants. The chancellor, deciding that there was an entire want of such proof, dismissed the complainants' bill. We must, at the threshold of this case, ascertain whether the chancellor rightly adjudged that the execution of such instrument was not proved.

W. B. Gowen, the complainants' witness, was asked by the defendants in their second cross-interrogatory, "who signed the firm name to the power of sale referred to in the 7th interrogatory?" The 7th interrogatory refers to

the power of sale given to the mortgagee, after the execution of the mortgage, authorizing him to sell under the mortgage. The witness answers this 2d cross-interrogatory thus: "I did not see *it* signed, but, upon examination, I find that the *mortgage*, which includes the power of sale, was executed by L. B. Pope; that the signature W. B. Gowen & Co. is in the handwriting of L. B. Pope." If this testimony were all the evidence, it would at least be doubtful whether the evidence satisfactorily identified the power of sale, and proved its execution; for there is no power of sale included in the mortgage, and the mortgage is not signed W. B. Gowen & Co., and the mortgage and power of sale are distinct instruments. The answer to the first rebutting interrogatory fully solves the difficulty of comprehending the answer to the 2d cross-interrogatory, by showing that the witness denominated the power of sale a mortgage, and spoke of it as a mortgage including a power of sale. In it he states, that he had seen a *mortgage*, purporting to have been executed by W. B. Gowen & Co., to C. G. Gunter, for the land in question; that he saw it in the city of Montgomery, on the day of his examination; that it was attached to interrogatories propounded to H. W. Watson and others, and in the possession of D. H. Workman, the commissioner. It appears from the testimony, that the deposition of H. W. Watson and others was taken, two days before the deposition of W. B. Gowen, in the city of Montgomery; that D. H. Workman was the commissioner, who took both depositions; that the power of sale, purporting to be executed by W. B. Gowen & Co., was attached to the interrogatories to H. W. Watson and others, and that the mortgage was not. From this it is obvious, that the witness, in answer to the 2d cross-interrogatory, spoke of the power of sale as a mortgage, and proves the signature of W. B. Gowen & Co. to be in the handwriting of L. B. Pope. The ground, therefore, upon which the chancellor dismissed the bill, is not sustained.

1. It is insisted, on the part of the appellees, the defendants below, that the power of sale does not bind W. B. Gowen, the partner who did not participate in the execution of it, but is only obligatory upon Pope, the partner who

subscribed the partnership name. In commercial partnerships, a subsequent ratification by parol, of a sealed instrument executed by one partner in the partnership name, may be proved by verbal evidence, and retroacts and binds the ratifying partner from the date of the instrument.—*Herbert v. Hanrick*, 16 Ala. 581–589. The ratification by Gowen was very distinctly and clearly proved by Wm. A. Gunter; but the chancellor erroneously excluded the evidence, on the motion of the defendants. This evidence being admitted, and considered in connection with the evidence of W. B. Gowen, there can be no doubt that Gowen was as much bound by the power of sale, as if he had himself executed it.

2. W. B. Gowen had no interest in the suit, not being bound by any warranty or covenants; and he was, therefore, a competent witness, and not a necessary party.

3. The covenant of Williams and wife ran with the land, and suit could be brought upon the same in the name of the assignee, holding under their grantee.—*Claunch v. Allen*, 12 Ala. 159. The complainant, C. G. Gunter, is such an assignee. The written instrument of G. T. Gunter transferred all right and title derived by the purchase at the mortgage sale to C. G. Gunter, and thus constituted the latter the assignee of the covenants running with the land.

4. The complainant, C. G. Gunter, yielded the possession to a paramount title; and that is sufficient to sustain an action upon the covenant of warranty, notwithstanding there may have been no ouster by action at law.—*Dupuy v. Roebuck*, 7 Ala. 484; *Davenport v. Bartlett & Waring*, 9 Ala. 179; *Claunch v. Allen*, 12 Ala. 159; *Griffin v. Reynolds*, 17 Ala. 198.

5. The principle settled in *Blevins v. Buck*, (26 Ala. 292,) and *Plowman & McLane v. Riddle*, (14 Ala. 169,) justifies the making of George T. Gunter a co-complainant with his assignee, the beneficial plaintiff, Charles G. Gunter.—See, also, *McLane & Plowman v. Riddle & Burt*, 19 Ala. 180.

6. We can not assent to the proposition, that Mrs. Williams has not bound her separate estate by joining in the deed to Gowen & Co. A married woman is regarded in equity, so far as her separate estate, created by contract, is

concerned, as a *feme sole*, and she may bind her separate estate by any contract by which she could bind herself if sole and unmarried.—*Faulk v. Wolfe & Gillespie*, 34 Ala. 541; *Roper v. Roper*, 29 Ala. 247; *Booker v. Booker*, 32 Ala. 473; *Drake and Wife v. Glover*, 30 Ala. 382. The power of the wife to bind her separate estate by the covenants of a deed is evidently asserted in the general principle which we have announced above; and we know of no case, or doctrine, upon which such power could be excepted from the general rule. We must, therefore, decide that the separate estate of Mrs. Williams was bound by the covenants of the deed to W. B. Gowen & Co., and must be subjected to the satisfaction of the complainants' damages resulting from the breach of those covenants.

The chancellor erred in dismissing the complainants' bill, and in not granting them relief.

The chancellor, in an able opinion upon a demurrer to the bill, sustains the views expressed by us upon the merits of this case. We refer to his reasoning and collection of authorities in that opinion, in support of our conclusions.

Reversed and remanded.

BYRD, J., not sitting.

MOORE vs. MURRAH.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF CONTRACT.]

1. *Who are necessary parties to bill.*—Where a bill seeks the specific performance of a contract relating to real estate, and a divestiture of the legal title which was in a decedent, his heirs-at-law are necessary parties to the bill.
2. *Premature submission of cause; dismissal without prejudice.*—When a cause is prematurely submitted, on pleadings and proof, infants who are necessary parties defendants not having been brought before the court, the chancellor may either set aside the submission, and remand the cause to the docket, or he may dismiss the bill; but, if

the proof shows that the complainant has any claim to relief, the dismissal should be without prejudice; and if he dismisses the bill on the merits, without noticing the defect, the appellate court will reverse his decree, and render such decree as he ought to have rendered.

3. *Agreement of record, waiving irregularities.*—An agreement of record, between the counsel of the appellant and appellee, waiving all irregularities, and consenting to try the cause upon the merits of the decree and testimony, will not be allowed the effect of putting the chancellor in error, nor of requiring the appellate court to dispose of the cause on its merits, when it appears that there are infants who are necessary parties, and who were not brought before the court.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed, on the 10th December, 1858, by James Moore, against the personal representatives, widow, and children and heirs-at-law of Amos B. Murrah, deceased; and sought the specific performance of a contract, by which, as alleged in the bill, Murrah agreed to advance the money necessary to enter a tract of land of which said Moore was in possession, and to which he had a pre-emption right, take the title from the government in his own name, and convey to said Moore on repayment of the purchase-money. The bill alleged, that Murrah entered the land in his own name, pursuant to the terms of the contract, and always recognized and admitted Moore's claim; that he died without having made a conveyance of the title, although he had received full payment of the purchase-money; and that his administrators refused to convey, and denied Moore's rights under the contract. Several of Murrah's heirs-at-law were described as infants and minors, and process of subpoena was prayed against all the defendants; but the record nowhere shows the service of process on any of the defendants, nor the appointment of a guardian *ad litem* for the infants. Answers were filed by the widow, the administrators, and one of the adult heirs-at-law, denying all knowledge of the alleged contract, and alleging that the complainant held possession of the land merely as the tenant of Murrah. The cause was submitted for a final decree, on pleadings and proof, at the May term, 1860, when the chancellor rendered a decree dismiss-

ing the bill; holding that the contract between the complainant and Murrah, as proved, was intended to defraud the creditors of the former, and that its terms were too indefinite and uncertain to justify a decree for specific performance. The chancellor's decree is now assigned as error; and there is an agreement of record, signed by the counsel of both parties, to the effect that they "waive all irregularities, and agree to try the cause upon the merits of the decree and the testimony."

WM. H. WALKER, for the appellant.

LUKE PRYOR, *contra*.

BYRD, J.—1. The heirs of Amos B. Murrah, deceased, are necessary parties defendant, in order to entitle appellant to the relief he seeks.—Story's Eq. Pl. § 177 *a*.

2. It does not appear that the infant heirs of Murrah were served with process, or that a guardian *ad litem* was appointed to make defense for them. The submission of the cause was, therefore, premature. The chancellor could have set it aside, and required them to have been made parties, according to the rules and practice of the court. But this is a matter of discretion, which this court will not review. The court is not bound to protect a party against the consequences of a premature submission of his cause. As it was discretionary with the court to set aside the submission, or to dismiss the bill on account of the failure to make the infant heirs of Murrah parties, the decree of the chancellor cannot be reversed and remanded. In our opinion, the chancellor should have dismissed the bill without prejudice to appellant. Without intimating any opinion on the merits of the cause, he may be entitled on another bill to some remedy under the authority of the case of *Goodwin v. Lyon*, (4 Porter, 297,) if not to a specific performance of the contract set out.

3. There is an agreement of counsel, endorsed on the record, by which they agree to waive all irregularities, and to try the case upon the merits of the decree and testimony. This agreement cannot aid the defect alluded to. If the chancellor properly dismisses a cause, no subsequent agree-

ment of counsel can put him in error. Nor do we think it proper to pass upon the merits of the cause, in the absence of any one authorized by law to represent the infant heirs of Murrah.

We will reverse and render a decree according to the practice of this court in such cases. The following entry will be made: It is ordered and adjudged, that the decree of the chancellor be reversed, and that the bill be dismissed without prejudice, and that appellant pay the costs of the court below, and that he and his surety for the costs of the appeal pay the costs of this court.

NOLES' HEIRS *vs.* NOLES' ADM'RS.

[SALE OF DECEDENT'S REALTY FOR EQUITABLE DIVISION.]

1. *Limitation of appeal.*—The act approved February 21, 1866, entitled "An act to authorize appeals from the probate court," (Session Acts, 1865-6, p. 64,) applies to decrees from which appeals were already barred at the passage of the act; and this application of the statute is not obnoxious to any constitutional objection, as taking away or impairing vested rights.
2. *Sufficiency of petition in description of heirs.*—In a petition for the sale of a decedent's real estate, for equitable division among the heirs, (Code, § 1868,) the statute requires that the names and residences of the heirs shall be stated; and an averment that the names of two of the minor heirs, who are shown to reside in the county, "are unknown," is not sufficient to sustain the order of sale on appeal.

APPEAL from the Probate Court of Russell.

IN the matter of the estate of Parker C. Noles, deceased, on the application of the administrators for an order to sell the real estate for the purpose of making an equitable division among the heirs. The first petition, which was filed on the 17th September, 1861, in averring the names, &c., of the heirs, alleged that there were "two minors, names un-

known, residing with Oliver Tillinghast, in Girard, Alabama." The order of sale under that petition was granted on the 13th January, 1862; and the appeal from that decree was sued out on the 16th June, 1866. In the other case between the same parties, the petition for the sale was filed on the 21st August, 1862, and asked a sale of the lands in which the widow's dower had been assigned, she having died. The petition did not state the names of the heirs; but it was accompanied with an affidavit by one of the administrators, in which the heirs were described as in the former petition. The order of sale under this petition was rendered on the 1st December, 1862; and the appeal from it was sued out on the 16th June, 1866. The two cases were argued and submitted together, the decree in each case being assigned as error. The appellees submitted a motion in each case to dismiss the appeal.

G. D. & G. W. HOOPER, for appellants.

L. F. MCCOY, *contra*.

JUDGE, J.—The appeal was taken, in each of these cases, within six months after the passage of the act of February 21, 1866, entitled "An act to authorize appeals from the probate court." In *Page and Wife v. Moore*, decided at the present term, we held that this act was not obnoxious to constitutional objection, in its application to cases in which appeals had been barred by lapse of time under the prior law. The motion to dismiss the appeal in each case, must, therefore, be overruled.—See Acts, 1865-6, p. 64.

2. As to the merits of the cases, submitted by agreement between the parties, together with the motions to dismiss the appeals: Section 1868 of the Code is explicit as to what must be shown in an application to the probate court, for an order to sell lands for distribution; and its terms are imperative. Amongst other things, it is required that the names of the heirs or devisees, and their places of residence, shall be given. The application in each of the cases before us is, in this respect, strikingly defective. Two of the heirs, it is averred, are minors; and it is stated that

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their names are unknown. From aught that appears, their names might have been readily ascertained, the application showing their residence to have been in the county in which the proceeding was had.

This view being decisive of each of the cases, we deem it unnecessary to consider the sufficiency of either application in other respects, or any other point presented by the assignments of error. We remark, however, in the language of this court, in the case of *Cloud and Wife v. Barton*, (14 Ala. 349,) "that attention to the statutes, and our decisions in respect to applications by executors and administrators, will enable the probate court to avoid error in form and mode of proceeding at least."

The decree in each of the cases is reversed, and each cause is remanded.

WHITTEN AND WIFE vs. GRAVES.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Presumption in favor of judgment ; specification of grounds of demurrer.*—When a demurrer has been sustained by the primary court, the appellate court will presume, unless the record affirmatively shows the contrary, that causes of demurrer were specified as required by the statute, (Code, § 2253,) and, if the pleading to which the demurrer was sustained is defective, will presume that the demurrer was sustained on account of that defect.
2. *Parties to proceedings ; when husband and wife must join.*—A petition, filed in the probate court, in the name of the husband alone, asking the correction of alleged errors in the final settlement of the accounts and vouchers of his wife's late guardian, is demurrable on account of the non-joinder of the wife.
3. *Amendment of judgment nunc pro tunc ; presumption in favor of judgment.*—When a decree is rendered *nunc pro tunc*, as on final settlement of a guardian's accounts, which recites that "it appeared to the satisfaction of the court, from the records of the court, and from the papers on file relating to the settlement", &c., while the contents of the records and papers are not set out, the appellate court will presume that they authorized the decree which was rendered.

4. *Construction and validity of decree on final settlement of guardian's accounts.*—When a decree of the probate court, rendered on final settlement of a guardian's accounts, shows on its face that the guardian has delivered to the ward's husband all the property which came to his hands, its validity is not affected by an additional order that he retain the balance found due him "out of any assets in his hands"; such order has no other force or effect than a certificate of the balance due him.

APPEAL from the Probate Court of Lowndes.

In the matter of the final settlement of the accounts and vouchers of Peyton T. Graves, as guardian of *Christiana* (or *Anna*) Turner, a minor, now the wife of Charles H. Whitten. The letters of guardianship were granted by said probate court on the 5th November, 1863; and the guardian filed his accounts and vouchers for a final settlement on the 23d December, 1865. On the 22d January, 1866, a decree as on final settlement was rendered by the court, but it was not entered on the minutes. On the 16th May, 1866, Charles H. Whitten filed his petition in the court, asking the correction of alleged errors in the account, as stated and allowed by the court. "On the day set for the hearing of said petition", as the bill of exceptions states, "the defendant demurred to the petition, and to each part thereof; and on this demurrer the plaintiff joined issue. The court sustained the demurrer, and overruled the petition; to which rulings of the court the plaintiff excepted. The matter was then continued until the 20th day of June, 1866, when the said Peyton T. Graves came by attorney, and also the said Anna Whitten and Charles H. Whitten by attorney; and the said Graves moved the court to enter on the minutes, *nunc pro tunc*, a decree rendered on the 22d January, 1866, on the final settlement of his accounts as guardian of said Anna, in the words and figures following:

<p>"Peyton T. Graves, guardian, <i>vs.</i> Anna Whitten, formerly Turner, and Charles H. Whitten, her husband.</p>	}	<p>This 22d day of January, 1866, came the said Peyton T. Graves, guardian as aforesaid, and also came Philip H. Cook, esq., the guardian <i>ad litem</i> of the said Anna, appointed by this court; and it appearing to the satisfac-</p>
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tion of the court that the said Peyton T. Graves heretofore, to-wit, on the 23d day of December, 1865, filed his account, vouchers, and evidences, for a final settlement of his said guardianship; and the said account, vouchers, and evidences, having been examined by the said guardian *ad litem*, and he making no objection to the same; and it appearing that due notice of the time and place of this settlement was given, by putting up notice of the same more than three weeks before the 22d day of January, 1866, the time set for said settlement by former order of this court, on the courthouse-door, and at three other public places in this county, there being no newspaper published in this county; the court proceeds to hear the matters pertaining to this account, and to consider the evidences submitted relating thereto. Whereupon it is shown by sufficient proof, that the said guardian has received as assets of said ward's estate sixteen bales of cotton, valued at thirty-two hundred dollars, and other personal property to the value of twenty-five hundred and eighty dollars; which cotton and other personal property, it is shown by proof, has been turned over by said guardian to Charles H. Whitten, the husband of said Anna. It further appears, by sufficient proof, that the said guardian has received no money assets belonging to said ward. It further appears from an inspection of said account, and from the proof relating thereto, that the said guardian has expended for the necessary support and maintenance of his said ward, the sum of four thousand seven hundred and ninety-five 93-100 dollars in Confederate money; for which amount the court now allows him, from proof submitted, a credit of four hundred and seventy-nine 59-100 dollars. It also appears, that the said guardian expended the following amounts in the proper execution of his guardianship—to-wit, to James Harrison, eighteen dollars; to Clements & Williamson, fifty dollars; court cost, twenty-four 90-100 dollars, and also six hundred dollars, which it is shown the said guardian has paid to his said ward, through the said Charles H. Whitten, her husband; all of which amounts are allowed by the court. The court allows the said guardian the amount of one hundred and thirty-five 34-100 dollars, as commissions for expenditures

as above stated, and the further sum of one hundred and fifty-two dollars as commissions on the value of the personal property turned over to the husband of his ward. It appears from the above that the whole amount expended by the guardian for his ward, including commissions allowed, is fourteen hundred and sixty 33-100 dollars; which amount it is ordered and decreed, that the said guardian retain out of any assets in his hands, belonging to his said ward. And said account appearing to be full and correct, it is considered and decreed by the court, that said accounts be, and the same are hereby in all things, passed and allowed as above stated. It is further ordered, that said account be recorded, and that all vouchers, evidences, and settlements relating thereto, be filed in this court. It is further ordered, that said P. T. Graves be discharged from any further duty as guardian as aforesaid, it appearing that his said ward intermarried in the spring of 1865 with Charles H. Whitten, who is over the age of twenty-one years."

The bill of exceptions, or the decree, then proceeds as follows: "And now, it appearing to the satisfaction of the court, from the records of this court, and from papers on file relating to the settlement in which the above decree was rendered, that the said decree was rendered on said 22d January, 1866, and has not been entered on the minutes of the court, it is therefore ordered, adjudged, and decreed, that the decree above set forth be now entered on the minutes, *nunc pro tunc*, as the proper decree on said settlement rendered on said 22d January, 1866." The bill of exceptions, in another place, contains this recital: "Only the following entry being made on the records of the court to show that a settlement had been made, to-wit: 'January 22, 1866, Decree on final settlement.'" "The said Charles H. and Anna Whitten resisted the said motion of said guardian, and objected to the rendition of said decree *nunc pro tunc*, and asked that the motion be dismissed; but the court overruled their objections, and entered up the decree *nunc pro tunc*; to which rulings of the court the said Charles H. and Anna Whitten excepted."

The appeal is sued out, according to the certificate of the probate judge, "from a decree rendered in said probate

court on the 20th day of June, 1866, overruling a petition by said C. H. Whitten, in right of his wife, to correct alleged errors in the account-current on final settlement of said P. T. Graves as guardian of said Anna Whitten, and granting a motion of said Graves, as guardian aforesaid, to enter up a final decree on final settlement, *nunc pro tunc*, as of the 22d January, 1866." The several rulings of the court to which exceptions were reserved, and the final decree, are now assigned as error.

W. C. GRIFFIN, for appellants.

CLEMENTS & WILLIAMSON, *contra*.

BYRD, J.—1. The appellant, C. H. Whitten, filed a petition, which is set out in full in the bill of exceptions; and it appears from the bill that the appellee interposed a demurrer to the petition, and that the court sustained the demurrer, and overruled the petition. In the absence of grounds of demurrer assigned, we must presume that some were assigned *specially*, in order to sustain the ruling of the court below.—*Newsom v. Huey*, 36 Ala. 37.

The next question is, whether we are bound to look into the petition, to see if any special ground could have been assigned, which should have been sustained. A party complaining of the action of an inferior court, must affirmatively show error. If a demurrer is sustained to the pleading of such party, and the pleading is perfect, then error so appears. As the husband alone filed the petition in his own name, this was a defect which could have been reached by a demurrer; and therefore we must presume that the court sustained it on that ground.—36 Ala. 37; *Pickens v. Oliver*, 29 Ala. 528.

3. A motion was made to enter a decree *nunc pro tunc*, which was heard on a different day from the demurrer to the petition. The bill of exceptions shows that the decree was ordered to be entered, and the order is set out, which recites that it appeared "to the satisfaction of the court, from the records of this court, and from papers on file relating to the settlement", &c. The bill of exceptions does not show what were the contents of the records, or papers

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on file ; and we must intend, in the absence of their contents, that the court was authorized therefrom to make the order.

4. The decree, upon its face, is regular, and is a final decree ; and it clearly appears that the guardian had delivered to the husband all the property of his wife which had been in the possession of the guardian. The order in the decree, that the guardian “retain the balance due him out of *any* assets in his hands belonging” to his ward, has no force or validity further than a certificate of a balance due the guardian ; it appearing from the decree that the guardian had no assets of his ward in his hands.

There is no error, and the decree must be affirmed.

JUDGE, J., not sitting, being disqualified by relationship to one of the parties.

DOTHARD *vs.* TEAGUE.

[PETITION FOR RE-HEARING AFTER FINAL JUDGMENT AT LAW.]

1. *Sufficiency of petition.*—A defendant in an action at law, upon whom process was served in September, 1862, and against whom a judgment by default was rendered in February, 1866, can not obtain a re-hearing or new trial under the statute, (Code, § 2408,) by averring in his petition that he “was conscripted” on the same day the summons was served ; that the process was executed by a special deputy of the sheriff, who did not inform him of his authority ; that, knowing the officer was not a regular deputy, and not being informed of his special appointment, “he believed it to be a trick of the plaintiff’s to scare something out of him” ; that “he labored under the belief that, before anything further could be done, some other notice would have to be given” ; that, but for this mistake and inadvertence on his part, he would have appeared and defended the action, to which he had a good defense ; and that “there was a general belief among the people of the county, in which he participated, that the judicial and ministerial acts of those in office during the war would be held void and of no effect.” These averments do not show accident, surprise, mistake of fact, or fraud, nor negative fault and negligence on his own part.

2. *Amendment of petition.*—There is no statute, or rule of practice, which prohibits an amendment, by leave of the court, of a petition for a re-hearing or new trial after final judgment at law, (Code, § 2408;) consequently, an amendment may be allowed, after a demurrer has been sustained to the original petition.
3. *When appeal lies.*—By the long and unquestioned practice of this court, an appeal lies from a judgment granting a re-hearing or new trial, (Code, §§ 2408 *et seq.*), after final judgment.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. JOHN HENDERSON.

THE appellant in this case obtained a judgment in said circuit court, against the appellee, on the 28th February, 1866. The action was in trover, for the conversion of a "copper still," and was commenced on the 16th September, 1862; the summons being executed on the 20th September, by one J. B. Watson, as special deputy of the sheriff. The judgment was by default, with writ of inquiry, which was executed on the same day. On the 20th March, 1866, the defendant in the judgment filed his petition for a re-hearing, or new trial, under the statute. The following are the material averments of the petition: "Your petitioner represents, that by reference to his descriptive list it appears that he was conscripted on the 20th September, 1862, the day the summons shows him to have been served; and he further represents, that he went into actual service on the 20th October, and continued in service until the close of the war. Shortly after the close of the war, it occurred to him that he had been served with a summons in this case by J. B. Watson; but, not knowing nor believing said Watson to be either sheriff or deputy sheriff, he believed it to have been a trick of Dothard's to scare something out of him, as he had never pretended to own the still in controversy; and he labored under the belief that, before any thing could be done, some other notice would have to be given, as he has no recollection that said Watson gave him any notice of his authority to serve said summons as a special deputy, and said Watson was not at the time a regular deputy. Petitioner further states, that he was so well satisfied in his own mind that it was a trick of Dothard's

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to scare something out of him, knowing that said Watson was not a general deputy of the sheriff, that it caused him very little concern; and he does not now remember that the transaction, or the existence of such a suit, had occurred to his mind for six months preceding the last term of said court; and consequently it did not occur to him that he had any business in court, and he was not in attendance on the court when said judgment was rendered. Petitioner states that, but for the mistake and inadvertence set forth in this petition, he should have appeared, and made defense to said action; that said judgment was in fact a perfect surprise to him; that he has a good defense to the merits of said action, and can prove," &c.

The court sustained a demurrer to this petition, but allowed the petitioner to amend it; and the following averments were then added to it: "Petitioner states positively that, at the time of the service of said summons and complaint, said Watson was not the regular deputy of the sheriff of said county, but, as appears by an endorsement on the original summons and complaint, had been specially deputized to serve the same; which endorsement was not transferred on the copy served on petitioner, that he now recollects of, and he verily believes that such an endorsement never was made; the copy being lost or mislaid, so that it cannot now be produced. Said Watson gave petitioner no notice of such authority on his part, but handed the copy of the summons and complaint to him, without saying one word about his authority. Petitioner did not recognize said Watson as either the general or special deputy of the sheriff, for the reason that said Watson did not inform him of his authority to act. Petitioner further states, that there was a general belief among the people of this county, in which he participated, that the judicial and ministerial acts of those in office during the war would be held void and of no effect; and that, therefore, new notice would have to be given, if not new suits commenced."

The court overruled a demurrer to the petition as amended, and granted a re-hearing of the cause as prayed. The plaintiff excepted to the allowance of the amendment, and

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to the overruling of his demurrer to the amended petition; and he now assigns these rulings of the court as error, together with the judgment granting a re-hearing.

W. H. FORNEY, and JAMES AIKEN, for appellant.

BYRD, J.—The petition for a new trial, when subjected to the test of the principles and rulings announced in the following cases, cannot be sustained; and the demurrer thereto should have been.—*White v. Ryan & Martin*, 31 Ala. 400; *Shields v. Burns*, 31 Ala. 535; *Elliott v. Cook*, 33 Ala. 490; *Stewart v. Williams*, 33 Ala. 492. If there was any accident, mistake, surprise, or fraud, which would authorize the granting a new trial, still the appellee does not show that he was *without fault*. If he made any mistake, it was one of law, and not of fact; and he states facts in the petition which should have put him on his guard, and made him diligent in making inquiry as to the pendency of the suit, and in preparing for its defense.

2. The court below allowed the appellee to amend his petition. It had the authority to do so, and we can perceive no error in the action of the court in this respect. Like all other legal proceedings, it is within the power of the court to allow an amendment of them before trial, unless there is some law or rule of practice prohibiting; and we know of none which inhibits it in such a case as this.—*Vide* cases cited above.

For the error pointed out, the judgment must be reversed, and the cause remanded for further proceedings.

DAVID *vs.* SHEPARD.

[BILL IN EQUITY TO ENFORCE EQUITABLE ESTOPPEL.]

1. *What constitutes equitable estoppel.*—If a party who is interested in an estate, and who has knowledge of his rights, misleads another into dealing with the estate, he will be postponed in equity to the party so mislead, and will be required to make good his representations, even to the extent of any claim or title he may have in or to the estate; and this, though the representations are verbal, and without consideration moving directly to him.
2. *Title of purchaser at sheriff's sale, as affected by adverse possession.*—Where the defendant in execution has the legal title, or a complete equitable title, the title passes by the sheriff's deed to the purchaser, notwithstanding the adverse possession of a third person at the time; but the purchaser can not, during the continuance of such adverse possession, convey his title by deed to another; yet, if the defendant in execution has the legal title at the time of the sale, and the adverse possessor induces a third person to buy from the purchaser at the sale, by verbally promising to waive his claims, and to surrender the possession, the adverse possessor can not set up against such sub-purchaser, in an action at law, either his adverse possession, or any title which he then held, and which he acquired subsequent to the sheriff's sale, and from any other person than the purchaser at that sale.
3. *Alternative averments in bill.*—As the averments in a bill are to be construed most strongly against the plaintiff, alternative averments are insufficient, unless each alternative shows a good cause of action.
4. *Equitable relief on grounds of estoppel and fraud, where remedy at law is adequate.*—A bill which alleges that the plaintiff, while negotiating with a purchaser at sheriff's sale for a tract of land, on learning that the land was in the adverse possession of the defendant, broke off the negotiations, and declined to proceed further with the contract; that the defendant thereupon came to him, begged him to make the purchase, and verbally promised to surrender the possession immediately, and to waive all his title and claim of every sort, reserving only his statutory right of redemption; that, relying on this promise, plaintiff consummated the contract; that the defendant afterwards refused to surrender the possession, and asserted title in himself, and set up his adverse possession to defeat an action at law brought by plaintiff to recover the land; that the defendant in execution, at the time of the sheriff's sale, had either the legal title to the land, or a complete equitable title; but that all his title-deeds were in the defendant's possession, and therefore plaintiff could not show title at law,—

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whether considered as seeking to enforce an estoppel, or as asking relief against fraud, is without equity, because it shows that the plaintiff has an adequate remedy at law.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. N. W. COCKE.

THE bill in this cause was filed on the 28th December, 1865, by Frank David, against Frederick B. Shepard. Its material allegations were the following: That on the 25th April, 1860, an attachment was issued out of the city court of Mobile, at the suit of the executors of James Perrine, deceased, against Charles B. Hopkinson; and a branch attachment in that case came to the hands of the sheriff of Baldwin county on the 28th April, and was levied by him, on the 2d May, 1860, on a certain tract of land in said county. That on the 6th December, 1860, a judgment was rendered in said attachment suit, in favor of said executors; and under an execution issued on said judgment, the said tract of land was sold by the sheriff, on the 3d June, 1861, and was purchased at the sheriff's sale by one Thomas Ellison, who received the sheriff's deed. On the 8th June, 1861, the complainant purchased said lands from said Ellison, and paid him the purchase-money in full, and obtained his deed for the lands; which deed, together with the sheriff's deed to said Ellison, was duly recorded; "and by virtue of said deeds and proceedings, complainant became entitled, legally and equitably, to all the right, title, and claim of said Hopkinson, in and to said lands." The original indebtedness, on which said attachment was sued out, was the debt of the defendant, F. B. Shepard, on which said Hopkinson was bound as endorser for him.

"For several years prior to said sale by the sheriff, said lands were in the possession of said Shepard, as the agent or lessee of said Hopkinson; and at the time of the said sale he was supposed to be still so holding for said Hopkinson. While complainant was negotiating with said Ellison for said lands, without any knowledge of any claim thereto on the part of said Shepard, a note was placed in his hands from said Shepard setting up claim in himself; and he was also informed personally that said Shepard

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claimed actual title to said lands in himself. On receiving this information, complainant immediately abandoned all idea of purchasing, and put an end to the negotiation. Shortly after this, said Shepard came to complainant, and stated, that he had consulted with his attorney since writing the said note, and had concluded (?) his objections, and permit complainant to purchase. On complainant's expressing an unwillingness to have anything further to do with it, said Shepard insisted on his purchasing, and said, that he wanted to get out of the hands of the *set* who then held it; and that if complainant would buy it, he would give him immediate possession, and would waive all his title and claims of every sort to the land, retaining only the right to redeem according to the statute, and to remove his then growing crop. Complainant finally agreed, that if said Shepard would go with him to his attorney, John Hall, esquire, and make such statements before him, he would buy the land. Said Shepard and complainant then went together to said Hall's office, where said Shepard again repeated what is above stated; that is, that he admitted the sheriff's title, and would put up no claims or objections to it; that he would waive his rights, retaining only the right to remove his crop, and to redeem according to the statute, and within the time prescribed. Relying entirely on the good faith and promise made by said Shepard, complainant agreed to buy, and did become the purchaser as above stated, and paid for the same in the bills of the Bank of Mobile, then specie-paying currency; all of which was done with the full knowledge and express assent of the said Shepard, and would not have been done if he had not entirely abandoned his claims, as above stated. Shortly after his said purchase, complainant sent an agent to take possession of a part of said land, when, to his great surprise, said Shepard prohibited his going on the land, and threatened to shoot and kill any one who offered to take possession for him; and he has forcibly kept complainant out of possession up to this time, alleging that he has a better title than complainant, and setting up the same claims before waived by him.

“Complainant further shows, that said Hopkinson had a

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legal title to said lands, or such is complainant's information and belief; yet all the deeds and title-papers are in the hands of said Shepard, or under his control, and, for this reason, complainant is unable to produce them, or to show a *claim* of title in an action at law. But, if complainant is mistaken in this, and said Hopkinson had not a complete legal title, then he insists that said Hopkinson had a complete and perfect equity, which could be and was sold by the sheriff to said Ellison, but which complainant is unable to make out at law, owing, as aforesaid, to want of access to the papers controlled by said Shepard. Complainant is unable to ascertain what is the true character of the claims held by said Shepard, as he refused to give complainant any knowledge of them; but, as complainant is informed, he claims under said Hopkinson. Complainant further says, that said Hopkinson and Shepard are brothers-in-law, and that said Shepard has possession of the papers and title-deeds to said lands; that said Hopkinson resides in Pennsylvania, and said Shepard in Alabama; that said Shepard sometimes claims that he was in possession of said lands, at the time of said sheriff's sale, under a written agreement of purchase from said Hopkinson, and sometimes he claims that he holds absolute deeds from Hopkinson, and that, though these papers were not recorded, yet his possession was notice to the world; so that complainant is unable to judge of the character and validity of the numerous deeds, agreements, and other contrivances, that have passed between said Shepard and Hopkinson, and Shepard refuses to give him any information. But this much complainant does know, that he never would have bought the lands, or become involved in any controversy whatever about them, had it not been on the solicitation of said Shepard, and on his waiving all his claims, and agreeing that complainant should have the quiet and uninterrupted possession, as above stated. Said Shepard has not redeemed said lands, nor has said Hopkinson. On the contrary, immediately after complainant had become the purchaser, said Shepard disputed all his right and title, refused to give him possession, and defied him; and complainant is therefore in danger of losing both his money and the land,

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unless this honorable court interposes. Complainant commenced an action for said land, in the circuit court of Mobile, which is now pending; to which action the defendant pleaded, and denied all right of complainant; and he threatens to defeat said action, on the grounds above stated, and on the ground of adverse possession."

The prayer of the bill was, "that the said Shepard be forever enjoined from setting up any title in himself against complainant, or any outstanding title then existing; that complainant be placed in possession of said lands, and for other and further relief."

The chancellor sustained a demurrer to the bill for want of equity, and dismissed the bill, "but without prejudice to the complainant's right to file another bill touching the same subject-matter, or to proceed at law for the recovery of the lands"; and his decree is now assigned as error. The chancellor's opinion, if any accompanied the decree, is not set out in the transcript.

DARGAN & TAYLOR, for appellant.—1. That the case made by the bill is not obnoxious to the statute of frauds, as the chancellor erroneously held, see 1 Story's Equity, § 330; Adams' Equity, 150; 24 Miss. 614; 19 Ala. 481; 22 Ala. 548; 18 Ala. 182; 16 Ala. 714; 34 Ala. 595; 36 Ala. 86, 589; 1 Spence's Equity, 550.

2. The bill is one for relief, and not merely for discovery. It does not distinctly appear whether the complainant, by his purchase from Ellison, acquired the legal title to the land, or only a perfect equitable title; but it does distinctly appear that he acquired either the one or the other. If he has the legal title, the bill shows that it is fraudulently withheld by the defendant, and the remedy at law thereby lost, or at least rendered doubtful; which gives the chancery court jurisdiction on the ground of fraud.—1 Story's Eq. § 254, and cases there cited. If only an equitable title passed by the sale, the right to equitable relief is beyond dispute, on the authority of *McPherson v. Walters*, 16 Ala. 714; and *Bean v. Welch*, 17 Ala. 772.

GEO. N. STEWART, and P. HAMILTON, *contra*.—The allega-

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tions of the bill are vague, indefinite, uncertain, and contradictory; and the demurrer to it ought to have been sustained on that ground. If the sheriff's deed passed the legal title to the land, or a complete equitable title, the plaintiff's remedy at law is adequate and complete. If the defendant was in adverse possession of the land at the time of the sheriff's sale, and his adverse possession invalidated the plaintiff's purchase, a court of chancery cannot aid him. If he relies on the defendant's agreement as a waiver or extinguishment of his claim or interest, whatever it was, the statute of frauds is a complete answer to the bill.—Browne on Statute of Frauds, §§ 134, 267–8, 509; 1 Bro. C. C. 404; 16 Conn. 246; 4 Har. (Del.) 324; 2 Har. & G. 433; 2 Bro. C. C. 599. Considered in the light of a bill for discovery, it amounts only to a fishing bill.

BYRD, J.—If a person who is interested in an estate, with a knowledge of his rights, misleads another into dealing therewith, he will in equity be postponed to the party so misled, and will be required to make his representations good, even to the extent of any claim or title he may have in the estate.—Adams' Equity, 373. And this, though the representations are by parol, and without any consideration moving to the person who makes them. They do not operate as a conveyance of the interest of the party making them, but by way of *estoppel*, to preclude him from setting up any claim or title in himself at the time, against the party he misleads; and this *estoppel* is not available in a court of law, but may be enforced in a court of equity. *Doe, ex dem. McPherson v. Walters*, 16 Ala. 714; *Smith v. Mundy*, 18 Ala. 182; *Stone v. Britton*, 22 Ala. 543; *Walker's Heirs v. Murphy*, 34 Ala. 591. A court of equity will also enjoin a party from setting up an unconscientious defense at law, or from interposing impediments to the just rights of the other party.—2 Story's Equity, § 903.

The appellant does not insist that his bill is one for discovery in aid of the suit at law; but he seeks to enjoin the appellee from setting up any defense at law against the right of appellant to recover the land in controversy. The bill alleges that Hopkinson had a legal title, or "*insists*"

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that he had a perfect equity to the title to the land, when it was sold under execution and bought by Ellison. If so, Ellison acquired the *title*, though Shepard may have held adversely to Hopkinson at the time of the sale; but such a title could not have been conveyed by Ellison, while Shepard was in adverse possession.—*Coleman v. Hair*, 22 Ala. 598.

A bill which alleges the ground of action in the alternative, is insufficient, if one of the alternatives shows that the complainant is not entitled to the remedy sought, as the bill must be construed most strongly against the pleader; and we proceed, therefore, in the discussion of this cause, taking as true the averment in the bill that Hopkinson had the legal title at the time of the sale to Ellison.—*Andrews v. McCoy*, 8 Ala. 920.

If, before David bought of Ellison, Shepard induced David to buy as alleged in the bill, then the title which was in Ellison was transferred to David by the conveyance to him executed by Ellison, as against any *mere* adverse possession of Shepard; and the appellant was entitled, on the facts alleged in the bill, to sue in his own name, and recover the land, as against any title or *possession* which Shepard may then have held, if the *title* was acquired subsequent to the purchase of Ellison, and not from Ellison himself; but, as to *any* he may have acquired prior thereto, we express no opinion, as the question is not raised on the record.

The bill, it is true, alleges that Shepard *claimed title*; but that is not equivalent to an averment that he had title, when applied to land. Upon the allegations of the bill, the appellant has a clear and adequate remedy at law; although it alleges that all the title-deeds of Hopkinson to said land are in the hands of appellee, or under his control, and that, *for this reason*, appellant is unable to produce them, or show a claim of title in an action at law. Now, as this bill is not one for discovery, of what avail is this allegation to give jurisdiction? *Non constat*, but that he may be able to make proof of the contents of the deeds on the trial, upon notice to produce them.

The allegations of the bill being taken as true, the appel-

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lant has a legal title to the land, and appellee has none which is available against appellant in the suit at law; and therefore there would be no remedy afforded, in enjoining a claim or title which can not avail the appellee in such suit; and a court of equity will not entertain jurisdiction, upon the allegations of the bill, to put appellant in possession of the land.

The bill, if it had been framed with a view to that object, could have been entertained as a bill for a discovery and production of title-deeds in aid of the suit at law. There being no equity in the bill, on which the court could have predicated the relief asked, in the special or general prayer, the chancellor properly sustained the demurrer thereto. Story's Eq. Pl. § 311; Code, § 2877; 34th Rule of Chan. Practice, 24 Ala. p. 8; *Bryant v. Peters*, 3 Ala. 160; *Horton v. Moseley*, 17 Ala. 794; *Perrine v. Carlisle*, 19 Ala. 686; 29 Ala. 337; *Andrews v. McCoy*, *supra*; 35 Ala. 70.

Let the decree be affirmed.

NOTE BY REPORTER.—After the delivery of the foregoing opinion, the appellant's counsel applied by petition for a re-hearing, and submitted written and printed arguments with their petition. The annexed brief contains only a summary of their points and authorities. On a subsequent day of the term, and in response to their application, the opinion following the brief was delivered,

DARGAN & TAYLOR, for appellant.—1. While the bill seeks relief on two distinct and independent grounds, each of which is sufficient to uphold it, fraud is at the foundation of each. In the first place, the defendant's fraudulent representations which induced the plaintiff to purchase, and which amount to an equitable estoppel, cannot be set up at law to affect the title to the land.—*McPherson v. Walters*, 16 Ala. 714; *Smith v. Mundy*, 18 Ala. 182; 22 Ala. 543; *Walker's Heirs v. Murphy*, 34 Ala. 595; *Bishop v. Blair*, 36 Ala. 86; *Gimon v. Davis*, 36 Ala. 589. This special equity, which is not cognizable at law at all, gives chancery jurisdiction of the whole case.—*Adams' Equity*, 150; 1 Story's Equity, § 134; 17 Ala. 773.

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2. An independent ground of equity is the fraudulent suppression of the plaintiff's title-deeds and evidences of right; and on this ground alone, if there were no other, the court will take jurisdiction, compel the production of the deeds, deliver possession, and quiet the titles.—1 Story's Equity, § 254; 2 Ohio, N. S. 361; 4 Halsted, 127; 2 Ala. 572; 14 Ark. 345. If the deeds were all regularly recorded, and their contents could therefore be proved by secondary evidence, this would not take away the jurisdiction of equity on this ground.

3. If the jurisdiction of the courts of law, on the facts stated in the bill, were concurrent with that of the courts of chancery, that would not oust the jurisdiction of equity. To have that effect, the remedy at law must be neither doubtful, nor difficult, nor embarrassed, but clear, obvious, adequate, and complete.—2 Stewart, 420; 1 Stew. & P. 135; 20 Ala. 389; 21 Conn. 488; 24 Conn. 94; 17 Illinois, 112; 31 Miss. 706. If the plaintiff could recover at law, it would be by parol evidence; and when ejectment after ejectment had been brought, and his witnesses were all dead, he might be turned out of possession; and even if he were in possession, there would be a cloud over his title, which he could only remove by filing a bill in equity.

BYRD, J.—The appellant has made an application for a re-hearing, and furnished an argument in support thereof. The court is satisfied that the bill does not allege any fraud which gives a court of equity jurisdiction of the cause. It is not alleged that Shepard made the representations to appellant in bad faith, or with intent to defraud. The legal effect of the allegations presents the case of a party making representations, or a contract, binding on him, which he declines afterwards to make good or perform. In order for the court to take jurisdiction in such a case as this, *some* title or defense which would defeat the action at law must be distinctly and positively averred.—*Jones v. Cowles*, 26 Ala. 612; 18 Ala. 332; 26 Ala. 405.

The court carefully considered the allegations of the bill, in making up the opinion, and, in effect, passed upon the question of fraud, which is the *gravamen* of the argument

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for a re-hearing. We have again given the question a thorough investigation, and we are satisfied with the result heretofore announced; and this application must, therefore, be overruled.

SUMMERSETT vs. SUMMERSETT'S ADM'R.

[SALE OF DECEDENT'S LANDS FOR EQUITABLE DIVISION.]

1. *Amendment of order of sale, nunc pro tunc.*—An order for the sale of a decedent's lands for equitable division among the heirs, like any other judgment or decree, can only be amended at a subsequent term, *nunc pro tunc*, when the amendment is authorized by some matter of record, or *quasi* of record.
2. *Notice to heirs.*—To sustain an order for the sale of a decedent's lands for equitable division, the record must affirmatively show that the resident heirs, of full age, had the statutory notice, (Code, § 1869,) or that they appeared.
3. *Void order vacated at subsequent term.*—A void order of sale may be vacated by the probate court, on application, at a subsequent term.

APPEAL from the Probate Court of Pike.

IN the matter of the estate of Elizabeth Summersett, deceased, on the application of Alexander Summersett, the administrator, for an order to sell the lands for the purpose of making an equitable division among the heirs. The petition seems to have been filed on the 14th November, 1865, and the first Monday in January then next to have been set for the hearing; but the only evidence of these facts is contained in the following words, which are copied in the transcript immediately after the petition: "Filed in office 14th day of November, 1865. First Monday in January, 1866, set for hearing. Post notices." The bill of exceptions states, that on the first Monday in January, 1866, "an order was entered on the minutes of said

court, in the following words: 'Estate of Elizabeth Summersett, deceased. Day to hear application to sell lands of deceased for distribution. Granted upon testimony of J. W. Borum and Daniel Rowe; and order to sell on a credit of twelve months, with approved securities, interest from date, on Wednesday, the 31st inst., on premises of decedent. Notice by posting notices at the courthouse-door, and three other public places.' " The sale was made on the appointed day, and the administrator himself became the purchaser. The sale having been reported to the court, "the administrator moved the court, on the hearing of the application to confirm the sale, to amend the order of sale *nunc pro tunc*, by adding the words, 'and one hundred dollars cash', after the words 'on a credit of twelve months'; it being the understanding with the judge and the administrator, on granting the order of sale, that one hundred dollars in cash would be required; which motion the court granted, and the contesting heirs excepted." The contesting heirs objected also to the confirmation of the sale, and moved to vacate and set it aside; and their objection and motion being overruled, they excepted. The record nowhere shows notice to the heirs, whose names are stated in the petition; though it recites that "some of the heirs appeared by attorney", and that a guardian *ad litem* was appointed for the infants. Nor does the record show that any appeal was taken, except by inference from an acknowledgment by sureties for the costs of the appeal. The order of sale, the subsequent amendment of the order *nunc pro tunc*, the order confirming the sale, "and all the errors and defects which appear on the face of the record", are now assigned as error.

B. GARDNER, for appellants.

E. L. MCINTYRE, *contra*.

JUDGE, J.—1. The probate court transcended its authority in allowing the amendment of the order of sale, as is shown by the bill of exceptions. A record can only be amended, *nunc pro tunc*, by some matter of record, or mat-

ter *quasi* of record.—Shepherd's Digest, 396, § 32; *Harris v. Martin*, 39 Ala. 556.

2. The judge of probate, after appointing a day for the hearing of an application to sell lands, is required to issue a citation to the heirs or devisees, of full age, residing in this State, notifying them of the application, and of the day appointed for hearing the same; which citation must be served on such heirs or devisees ten days before the day appointed for the hearing.—Code, § 1869. In this case, it does not appear that the heirs of full age, residing in this State, received the notice required by the section of the Code above cited, nor that they were present at the hearing, either in person or by attorney. The order of sale recites, that proof was made that all the heirs "had notice strictly and in all respects in accordance with the order of the court made and entered in the proceeding, on the 14th of November, 1865." But the only semblance of an order in the decree of that date, so far as the record discloses, is the following: "Filed in office, 14th day of November, 1865. First Monday in January, 1866, set for hearing. Post notices." It therefore results that the order of sale is, of itself, a nullity.—Acts 1853-4, p. 55.

3. Reversing for the error first above mentioned, it will be in the power of the probate court, to vacate on application the void order of sale, so that the parties may commence *de novo*, if a sale of the land be necessary.

This view of the case renders it unnecessary to consider any of the other questions presented by the record. Let the order confirming the sale be reversed, and the cause remanded.

CARTER *vs.* BECK.

[ACTION BY PURCHASER TO RECOVER EXCESS OF PURCHASE-MONEY.]

1. *Acceptance of deed annuls agreement to convey.*—The acceptance by the purchaser of a deed from his vendor, is a complete execution of the vendor's antecedent agreement to convey, and annuls it; and an action at law cannot afterwards be maintained upon the agreement, on account of the deficiency in the land conveyed by the deed.
2. *When action lies for money paid; admissibility of parol to vary deed.* Parol evidence is not admissible, at law, to contradict a deed, by showing that it does not in fact convey the number of acres which it purports to convey; consequently, an action of assumpsit, on the common money counts, does not lie to recover the alleged excess of purchase-money paid.
3. *Construction of deed as to quantity of land conveyed.*—A deed, executed by an administrator, to the purchaser at a public sale made by him under an order of the probate court, which describes the several parcels composing the tract of land by the numbers of the section and township, stating the number of acres contained in each, and adding the words "*containing in all about*" a specified number of acres, which number is greater than the aggregate of the sums said to be contained in the several parcels: "which said land," it states, "was knocked off to B. for the sum of \$24,457.10,"—shows a sale of the land in gross, and contains no covenant as to quantity.
4. *Form of complaint in assumpsit for breach of special contract.*—A complaint which alleges, that the plaintiff claims of the defendant \$4,000, "as damages for the breach of an agreement entered into by him" on a specified day, "by which he promised to make to plaintiff, on" &c., "good and legal titles to" a specified quantity of land, sold by him, as administrator, under an order of the probate court; "to secure the payment of the purchase-money of which said land, plaintiff executed his promissory note," which he afterwards paid on a specified day; "at which time, defendant covenanted, agreed, and promised, to make to plaintiff good and legal titles to said lands"; "that defendant wholly neglected, failed and refused to execute to him titles to said land," but did, "in part performance of his said agreement," execute a deed for a part of the land, "and wholly failed and refused to make titles and execute a deed for the whole number of acres which he had covenanted, promised, and agreed to do"; "by reason of which breach of his agreement, plaintiff has been greatly injured and damaged, and an action has thereby accrued to him to have and demand the said sum above demanded; yet said defendant, although often requested so to do, has not as yet made

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titles to the whole number of acres by him agreed and covenanted and promised to be made by him," &c.,—is in assumpsit, and not in covenant.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN K. HENRY.

THIS action was brought by William K. Beck, against Augustus Carter, and was commenced on the 4th February, 1861. The original complaint contained the common money counts, and a special count in the following words: "The plaintiff claims of the defendant four thousand dollars, as damages for the breach of an agreement entered into by him on the 24th day of January, 1859, by which he promised, on the 7th day of February, 1859, to make to plaintiff good and legal titles to twelve hundred and twenty-nine acres of land, sold to plaintiff by him, as administrator with the will annexed of Thomas Carter, deceased, in pursuance of an order of the probate court of Wilcox county, Alabama, at public out-cry, on the 29th day of December, 1856, for nineteen 90-100 dollars per acre, and to secure the payment of the purchase-money of which said land, so sold to him, the plaintiff executed to said defendant, as administrator as aforesaid, his certain promissory note, with good and sufficient security, bearing date the 1st day of January, 1857, and payable, according to the terms of said sale, on the 30th day of December, 1857, for the sum of twenty-four thousand four hundred and fifty-seven 10-100 dollars; which said promissory note, with all interest thereon accrued, was paid in full by plaintiff to defendant, on the 24th day of January, 1859; at which time, to-wit, on said 24th day of January, 1859, the defendant covenanted, agreed, and promised to make to plaintiff good and legal titles to the said land so sold as aforesaid, and to all of it, on a day certain, to-wit, on the 7th day of February, 1859, in consideration of the said sum of twenty-four thousand four hundred and fifty-seven 10-100 dollars, with all interest thereon accrued, to defendant in hand paid by plaintiff, on and prior to the 24th day of January, 1859, as aforesaid. And plaintiff further says, that the defendant wholly failed and refused to make and execute to him titles

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to the said twelve hundred and twenty-nine acres of land, on the said day certain, to-wit, on the 7th February, 1859. Plaintiff further avers, that said defendant did, on the 14th day of February, 1860, make and execute to him a deed for eleven hundred and forty acres of said land, in part performance of his said agreement, but wholly refused, neglected and failed to make titles and execute a deed for the whole number of acres, to-wit, twelve hundred and twenty-nine acres, which he had covenanted, promised, and agreed to do, as aforesaid; by reason of which breach of his agreement by the defendant, plaintiff has been greatly injured and damaged, and thereby an action has accrued to him to have and demand of the said defendant the sum of four thousand dollars, above demanded. Yet said defendant, though often requested so to do, has not yet made titles to the whole number of acres by him agreed and covenanted and promised to be made by him to plaintiff on the 7th day of February, 1859, but has wholly refused and neglected, and yet refuses and neglects, to make titles to plaintiff to eighty-nine acres of the twelve hundred and twenty-nine acres which he pledged himself to do as aforesaid; to the damage of said plaintiff four thousand dollars, and therefore he brings suit."

At the April term, 1866, the plaintiff amended his complaint, by leave of the court, by adding a count in the following words: "Plaintiff claims of defendant, also, other four thousand dollars, due to him by defendant on the 24th day of January, 1859, with interest from the 30th day of December, 1857, for that plaintiff, on the 29th day of December, 1856, purchased at the sale of the lands of the estate of Thomas Carter, deceased, at public outcry, on a credit of twelve months, according to the conditions of the sale, from the defendant, the administrator of said Thomas Carter, deceased, the lands belonging to said estate, for nineteen 90-100 dollars, consisting, as alleged by defendant, and as plaintiff supposed, of twelve hundred and twenty-nine acres; to secure the purchase-money of which said lands, plaintiff executed to defendant his certain promissory note, bearing date the 1st day of January, 1857, and payable to defendant on the 30th day of December, 1857, for

twenty-four thousand four hundred and fifty-seven 10-100 dollars. Plaintiff further avers, that on the 24th day of January, 1859, he paid to defendant the full amount, principal and interest, of said note; and that afterwards, to-wit, on the 14th day of February, 1860, defendant executed to him a deed for only eleven hundred and ninety acres of land, instead of twelve hundred and twenty-nine acres, being thirty-nine acres less than that sold by defendant to plaintiff, and for which defendant received payment as aforesaid; and the said defendant is indebted to the plaintiff in the sum of seven hundred and seventy-six 10-100 dollars, the price of the said thirty-nine acres of land, with interest thereon from the 30th December, 1857."

At the same term, the defendant demurred to the complaint, "in short by consent, 1st, for uncertainty; 2d, for misjoinder of counts." The court overruled the demurrer, and the defendant then pleaded "the general issue, in short by consent"; and issue was joined on that plea. "On the trial," at the same term, as the bill of exceptions states, "it was in evidence that the defendant, as the administrator of Thomas Carter, deceased, on the first day January, 1857, sold the real and personal property belonging to said estate, at public outcry, on the premises, on a credit of twelve months; that when the land was offered for sale, the administrator caused the auctioneer to state that the whole tract would be sold, (except one acre at the grave-yard,) containing twelve hundred and thirty acres, more or less, and that the land was sold at so much per acre; that the land was bid off by the plaintiff at that sale, at nineteen 90-100 dollars per acre; and that plaintiff, on the same day, executed his note for the purchase-money of said land, with Thomas K. and F. K. Beck as his sureties." The plaintiff's note for the purchase-money, which he read in evidence, specified on its face that it was given "for the plantation of Thomas Carter, deceased." The plaintiff, "for the purpose of proving that twelve hundred and thirty acres of land were sold to him, at nineteen 90-100 dollars per acre," offered in evidence a written memorandum, the first item in which was in these words: "1230 acres of land, \$19.90"; and the other items were various articles of personal prop-

erty, with figures opposite to each ; as, "two ovens, \$3.00"; "one new gin, \$100," &c.; the whole, exclusive of the land, amounting to one hundred and thirty-five dollars ; and at the foot of said memorandum was a receipt, signed by the defendant, acknowledging payment of that amount by the plaintiff. The defendant objected to the admission of said memorandum as evidence for the purpose stated, "because the statement about the land was not in the defendant's handwriting"; and reserved an exception to the overruling of his objection.

The plaintiff then read in evidence, without objection on the part of the defendant, a receipt signed by the defendant, dated the 24th January, 1859, and a deed executed to him by the defendant, dated the 14th February, 1860. The receipt was in these words : "Received from Wm. K. Beck seven thousand seven hundred and twenty-seven 29-100 dollars, payment in full for twelve hundred and twenty-nine acres of land sold to him by me, as administrator of Thomas Carter, deceased, and known as the plantation of said Thomas Carter, being in full payment of balance due on note made by him to me as such administrator, dated January 1st, 1857, and payable December 30th, 1857, for purchase-money of said plantation ; to which plantation, and the several tracts of land, I pledge myself to make titles, as such administrator, on the 7th February, 1859." The deed recited the sale under the order of the probate court ; described the several tracts of land by the numbers of the section, township, and range, specifying the number of acres in each tract, and as "containing in all about twelve hundred and twenty-nine acres," though the aggregate number of acres specified as contained in the several tracts amounted to eleven hundred and ninety 94-100 ; recited that the "said land was struck off to Wm. K. Beck, for the sum of twenty-four thousand four hundred and fifty-seven 10-100 dollars," and conveyed to said Beck the title which the decedent had at the time of his death.

The plaintiff having here closed his evidence, the defendant offered to prove, by the records of the probate court, that he had made a final settlement of his administration on said Carter's estate before the commencement of

this suit, and had paid over to the distributees, under the order of the court, all the money which he had received from the plaintiff on account of the sale of said land; and he also offered to prove the fact of such payment, before the commencement of this suit, by verbal testimony. The court rejected this evidence, on motion, as irrelevant; and the defendant excepted to its exclusion. For the purpose of proving that the land conveyed by the deed "did in fact contain twelve hundred and twenty-nine acres," the defendant offered in evidence the "Alabama Tract Book," kept in the office of the probate judge by authority of law; which evidence the court excluded, as irrelevant, and the defendant excepted. The defendant then proved, "by the witness who wrote said deed, that it was written in the presence of the plaintiff and the defendant, and by their direction, and as they directed; and that the figures 1229 were inserted in said deed at the instance of said plaintiff, and with the consent and agreement of said defendant."

"The foregoing being all the evidence in the case, the court charged the jury—1st, that if the defendant sold to the plaintiff twelve hundred and twenty-nine acres of land, at nineteen dollars and ninety cents per acre, and took the plaintiff's note for the purchase-money, payable twelve months after date, and the plaintiff paid the full amount due on the note before the deed was executed to him by the defendant, and the defendant's deed conveyed to the plaintiff only eleven hundred and ninety acres of land,—then the plaintiff was entitled to recover from the defendant the value of thirty-nine acres of land at nineteen 90-100 dollars per acre, with interest thereon from the time said note became due; 2d, that the word '*about*' was not tantamount to the words '*more or less*' in a deed, and, if it were, it would qualify the number of acres only when the land was sold in gross, and not when it was sold at a certain sum per acre."

"The defendant excepted to each of these charges, and requested the court to instruct the jury—1st, that if they believed the evidence, the plaintiff was not entitled to recover; and, 2d, that if the plaintiff bought the land with the understanding that it contained twelve hundred and

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twenty-nine acres, more or less, and bid off the land at nineteen 90-100 dollars per acre, then, on the evidence, the plaintiff was not entitled to recover. The court refused each of these charges, and the defendant excepted to their refusal."

The several rulings of the court on the pleadings and evidence, the charges given, and the refusal of the charges asked, are now assigned as error.

PETTUS & DAWSON, for appellant.—1. Assumpsit and covenant can not be joined.—*Copeland v. Flowers*, 21 Ala. 472; *Harris v. Hillman*, 26 Ala. 380. Therefore, the demurrer for misjoinder should have been sustained.

2. The sale was a public sale by an administrator, under an order of the court; the whole plantation was sold in a body; there was no covenant or contract as to any particular number of acres; and neither the deed nor the receipt contains any covenant as to quantity.—*Grantland v. Wright*, 2 Munf. 179; *Phipps v. Tarpley*, 24 Miss. 597; *Frederick v. Youngblood*, 19 Ala. 680; *Wright v. Wright*, 34 Ala. 194; *Joliff v. Hite*, 1 Call, 301; *Cutts v. King*, 5 Greenl. 482.

3. The executory contract, whatever it was, was merged in the deed which the plaintiff accepted.—*Howes v. Barker*, 3 John. 506; *Houghtaling v. Lewis*, 10 Johns. 306; 1 Watts & Serg. 442; *Frederick v. Youngblood*, 19 Ala. 680.

4. If there was a covenant, there was no proof that it had been broken. The deed, which is the only evidence on the point, describes the land as "containing in all about twelve hundred and twenty-nine acres"—the exact amount which the plaintiff claimed.

5. The defendant should have been allowed to prove that he had made a final settlement of his administration, and had paid over to the distributees all the money which he had received.—*Burnett v. Town Council of Cahaba*, 34 Ala. 400; *Crutchfield v. Wood*, 16 Ala. 702.

S. J. CUMMING, *contra*.—1. Under the liberal system of pleading allowed by our statutes, there was no misjoinder of counts.—Code, § 2235; Session Acts, 1859-60, p. 16. If

any one count showed a good cause of action, the demurrer ought to have been overruled.

2. The whole evidence in the case shows that there was an agreement and stipulation for the sale of twelve hundred and twenty-nine acres; that the plaintiff bought and paid for that number of acres, and that the deed only conveyed to him eleven hundred and ninety acres. As to the construction and effect of the words used, the appellee relies on the following cases: *Minge v. Smith*, 1 Ala. 415; *Frederick v. Youngblood*, 19 Ala. 680; *Wright v. Wright*, 34 Ala. 194; *Cutts v. King*, 5 Greenl. 482.

3. As the defendant was sued individually, and not in his representative capacity, the settlement of his administration had no connection with the case.

4. The book of public lands, though required by law to be kept in the office of the probate judge, is mere secondary evidence of the facts stated in it; and it was properly excluded for that reason.

A. J. WALKER, C. J.—The acceptance of the defendant's deed by the plaintiff, was a complete execution of the antecedent agreement to convey, and annulled it; and no action at law can be sustained upon it.—*Howes v. Barker*, 3 Johns. 506; *Houghtaling v. Lewis*, 10 Johns. 297; *Cronister v. Cronister*, 1 Watts & Ser. 442; *Falconer v. Garrison*, 1 McCord, 209; *Frederick v. Youngblood*, 19 Ala. 680.

The decision in *Johnson v. Collins*, (20 Ala. 435,) is not opposed to this doctrine. There the obligation was that two persons should convey; one of them only conveyed, and it was held, that a conveyance by one was not, *prima facie*, a discharge of the obligation, but that whether it was such a discharge depended upon the question of its acceptance in satisfaction of the obligation to convey, which was determinable by the evidence. This decision obviously has no application to a case like this, where the deed is made by the sole party who stipulated to make it. Besides, in this case, it is apparent from the face of the deed, that it was made in fulfillment and performance of the defendant's obligation to convey, resulting from the plaintiff's purchase.

[2-3.] From what we have said, it results, that no action

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could be maintained upon the antecedent agreement. Nor could the action of assumpsit, in a common money count, lie to recover back the excess of money paid, for parol evidence is not admissible to contradict the deed.—See the authorities *supra*. The quantity of land is stated in the deed by way of description, and is not a matter of covenant, and the deed shows a sale in gross for a plantation of the specified description.—*Wright v. Wright*, 34 Ala. 194; *Frederick v. Youngblood*, 19 Ala. 680; *Dozier v. Duffie*, 1 Ala. 320; *Minge v. Smith*, 1 Ala. 415; *Jackson v. McConnell*, 19 Wend, 175; *Root v. Puff*, 3 Barb. 353.

The court erred in refusing to charge the jury, that if they believed the evidence, they must find for the defendant. If there is a mistake in the deed, the remedy is in chancery, and not at law.

[4.] The counts of the complaint, as we understand them, are all in assumpsit, and there is no misjoinder of counts.

Reversed and remanded.

FERGUSON ET AL. vs. CARTER.

[FORCIBLE ENTRY AND UNLAWFUL DETAINER.]

1. *Sufficiency of complaint*.—A complaint which alleges that, on a specified day, the plaintiff “was lawfully seized and possessed” of certain premises, and that, “being so seized, on the day aforesaid, the defendant did enter on and take possession of said premises, although notified by plaintiff not to enter,” does not show a cause of action, either for a forcible entry, or for an unlawful detainer.
2. *Same*.—A complaint which alleges that, on a specified day, “plaintiff was lawfully seized and actually possessed of” certain premises, and that defendant, “while said plaintiff was lawfully seized and in actual possession of said premises, with force and strong hand entered upon said premises unlawfully, and, after demand of possession thereof, detained, and does still detain the same, with force and arms,”—is good and sufficient.
3. *Statute of limitations as defense to action*.—The statute of limitations

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of three years, if available as a defense to an action for a forcible entry and detainer, must be taken advantage of by plea, and is not good matter for demurrer to the complaint.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

THIS action was brought by D. J. Ferguson and Benjamin Newton, against Herbert Carter, and was commenced on the 10th October, 1860. The original complaint was in these words: "The complaint of D. J. Ferguson and Benjamin Newton sheweth, that the said Ferguson and Newton, on the 1st day of June, 1857, *was* lawfully seized and possessed of a certain tract of land, to-wit, the south-west quarter of the south-west quarter of section thirty-six, township eleven, range thirteen, lying and being in the county aforesaid; and being so seized, on the day aforesaid, one Herbert Carter did enter on and take possession of the said premises, notwithstanding the said Carter *being* notified by us (Ferguson and Newton) not to enter on said premises, and that we held the lawful title to said premises on and after the first day of June, 1857; and said complainants did, in a quiet and peaceable manner, go to and demand possession of the premises aforesaid, to-wit, on the — day of February, 1860, in the county aforesaid; but the said defendant then and there resisted us, and refused to give and surrender the possession of the said premises to the complainants, although requested so to do, but then and now unlawfully holds and detains the said premises, against the right and lawful claim and entry of the said complainants, and against their consent and will, to their great damage."

The plaintiffs recovered a judgment before the justice of the peace, and the cause was then removed by the defendant, by appeal, to the circuit court. The defendant there demurred to the complaint, and assigned the following grounds of demurrer: "1st, that it appears from said complaint that the defendant has been in possession of the premises for more than three years before the exhibition of the complaint; 2d, that said complaint does not allege that the plaintiffs were ever in the actual possession of said

premises ; 3d, that said complaint does not show that the defendant entered on the premises with force or strong hand, or by exciting fear or terror, or by any threats of violence to the party in possession, or by any other actions or words having a tendency to excite fear or apprehension of danger ; 4th, that said complaint does not show that the defendant put out of doors or removed the goods and chattels of the complainants from the premises ; 5th, that the complaint does not allege that the defendant entered peaceably, and then, by force or threats, turned out, or kept the complainants out of the actual possession of the premises ; and, 6th, because there is no allegation that the defendant occupied the premises as the tenant of the complainants, and, after the termination of his possession entered (?) refused, on demand in writing, to deliver to the complainants."

The court sustained the demurrer, but allowed the plaintiffs to amend their complaint ; and the plaintiffs then filed a complaint in the following words : "The complaint of Darius J. Ferguson and Benjamin Newton shows, that on the first day of June, 1857, the complainants were lawfully seized and actually possessed of a certain tract of land lying in said county, and known and described" as in the original complaint ; "and that on or about the first day of June, 1859, (?) one Herbert Carter, while said complainants were in the actual possession of said lands, and lawfully seized thereof on the first day of June, 1857, with force and strong hand entered upon said lands unlawfully, and, after demand of possession thereof, detained, and still does detain the same, with force and arms, and against the statute in such cases provided." The defendant demurred to the amended complaint, and assigned the following as grounds of demurrer : "1st, that said complaint is insufficient in law ; 2d, that it appears from said complaint, and from the proceedings in said cause, that the defendant had the uninterrupted occupation of the premises for more than three years preceding the exhibition of the complaint ; 3d, that it does not appear by the complaint, that the defendant entered any house on the premises by breaking open doors, windows, or any other part of any house thereon ;

nor by threats or violence to any person alleged to have been in possession of said premises; nor by any words or actions having a tendency to excite fear or apprehension of danger; nor does it appear from said complaint that the defendant entered said premises by putting out of doors or removing the goods or chattels of any person alleged to have been in possession; nor does it appear from said complaint that the defendant entered peaceably into said premises, and then, by force or threats, turned or kept out any party in possession at the time of defendant's entry into said premises with force."

The court sustained the demurrer, and the plaintiffs, declining to plead anew, were compelled to take a nonsuit, with a bill of exceptions; and they now move to set aside the nonsuit, and assign as error the sustaining of the demurrers to the original and amended complaints.

HERBERT & POWELL, for appellants.

WATTS & TROY, *contra*.

BYRD, J.—1. The demurrer to the original complaint was properly sustained.—*Russell v. Desplous*, 25 Ala. 514; *S. C.*, 29 Ala. 308.

2. Under the liberal system of pleading authorized by the Code, we hold that the amended complaint is sufficient. The premises are described with legal certainty; the possession of complainants is alleged with sufficient accuracy; and the forcible entry and detainer by the defendant, though alleged in general terms, is allowable under the provisions of the Code; and the court, therefore, should not have sustained the demurrer thereto.

3. Without deciding whether the statute of limitations is applicable to this case, we are satisfied that it is a matter of defense, of which the defendant in the court below can only avail himself by plea.

Reversed and remanded.

MAGRUDER vs. CAMPBELL.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR PURCHASE-MONEY.]

1. *Joinder in error*.—A joinder in error by the appellee is a waiver of all objections to the form of the appeal or the assignments of error.
2. *What is available on error*.—Where the purchaser at an administrator's sale, under an order of the probate court, is joined with the decedent's heirs-at-law, as a defendant to a bill which seeks to enforce an outstanding vendor's lien on the land, he can not complain on error of an irregularity in the appointment of a guardian *ad litem* for an infant heir.
3. *Discretionary matters not revisable on error*.—It is discretionary with the chancellor, in passing on a demurrer for the non-joinder of necessary parties, to order "that a decision on said demurrer stand over, to the end that the plaintiff may apply to amend his bill by adding" the necessary parties; and his action in the premises is not revisable on error or appeal.
4. *Same*.—When a cause has been submitted for final decree on pleadings and proof, and held up for decision in vacation or at the next term, the chancellor may, in his discretion, set aside the order of submission at the next term, and restore the cause to the docket, in order that the plaintiff may make application to vacate and set aside a previous order suppressing a deposition; and it is also discretionary with him to set aside the order suppressing the deposition.
5. *Certainty requisite in allegations of bill, as to terms of parol contract sought to be enforced*.—In a bill which seeks to enforce a parol contract for the sale of lands, great precision and nicety are required, and the terms of the contract must be averred with distinctness and certainty. Where the bill seeks to enforce, in favor of an assignee, a vendor's lien for the unpaid purchase-money of land, an averment that C., the vendor, "permitted the said M., the purchaser, "to go into the possession of said land, and to occupy and cultivate the same, without rent or charge, but with the *understanding* that, when the said M. should become able to do so, he would repay the money so paid by the said C., with the interest thereon, and that the said C. would make him a title to said lands,"—does not, of itself, state the contract with sufficient certainty and definiteness to authorize a decree for the plaintiff; but it is sufficient, when construed in connection with the additional averments, that C., being indebted to plaintiff, transferred to him certain claims and demands which he held on M., "in which was included the said sum which M. had agreed with said C. to pay for said tract of land"; that plaintiff accepted the proposition, and M. also consented to it; and that plaintiff, by said transfer, "was substituted to all the rights of said C. as

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vendor, and has a right in equity to foreclose her lien upon said tract of land for the purchase-money."

6. *Assignment of debt and vendor's lien.*—A writing is not necessary to constitute a valid assignment of a debt for the unpaid purchase-money of land, or to make it effectual as an equitable assignment of the vendor's lien; and where the title remains in the vendor, the lien passes to the assignee with the debt, unless it is waived upon some consideration valid in law, or by some act operating by way of estoppel: neither the fact that the assignee accepted the transfer of the debt on the faith of the purchaser's promise to pay it in a short time, nor the fact that the purchaser's note was delivered up to him at the time of the transfer, nor these two facts combined, are sufficient to show such waiver.
7. *Competency of witness as affected by interest.*—Where a bill seeks to enforce an outstanding vendor's lien on land, which has passed into the hands of a sub-purchaser at administrator's sale under an order of the probate court, the heirs-at-law of the deceased purchaser and the sub-purchaser being joined as defendants, a distributee and heir-at-law of the deceased purchaser is a competent witness for the plaintiff, although his testimony tends to increase the assets of the estate.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE original bill in this case was filed on the 26th June, 1858, by Catherine Campbell, against William R. Magruder, and the heirs-at law of John McKay, deceased; and sought to enforce an outstanding vendor's lien on land for the unpaid purchase-money. The land was sold and conveyed, on the 26th June, 1841, by W. T. Hodnett, to John D. Campbell, at the price of three hundred dollars in hand paid; and the deed to said Campbell was duly recorded. The plaintiff's claim to relief was founded on an alleged parol contract for the sale of the land by said Campbell to said John McKay, who was his father-in-law, and a subsequent transfer to her, by said Campbell, of the debt on McKay for the unpaid purchase-money. McKay died, in possession of the land, in 1855; and it was afterwards sold by his administrator, under an order of the probate court, and was bought at the sale by said Magruder. The second and third paragraphs of the bill, which contain all the allegations as to the contract between Campbell and McKay, and the subsequent assignment to the plaintiff of the debt on McKay, are in the following words:

"2. Your oratrix further sheweth, that John McKay, who was then in life, but who is now deceased, was the father-in-law of the said John D. Campbell, and, at that time," (26th June, 1841,) "was much embarrassed in his pecuniary circumstances, and without a home; and that the said John D. Campbell, for the purpose of aiding his said father-in-law, permitted him to go into the possession of the said tract of land, and to occupy and cultivate the same without rent or charge, but, as your oratrix is informed and believes, and so charges, with the understanding that, when the said John McKay should become able to do so, he would repay the purchase-money so paid by said Campbell to the said Hodnet, with the interest due thereon, and that the said John D. Campbell would make him a title to the said land; and that the said John McKay went into the possession of the said tract of land with this understanding, and occupied it until his death, which occurred in the fall of the year 1855.

"3. Your oratrix further sheweth, that before the first day of January, 1853, the said John McKay had relieved himself of his embarrassed condition, and was amply able to pay the purchase-money for the said tract of land; and that on the said first day of January, 1853, the said John D. Campbell was justly indebted to your oratrix, in about the sum of eight hundred dollars, for money before that time loaned to him by her; and that the said John D. Campbell, at that time, proposed" [to transfer to your oratrix?] "in payment of his said indebtedness, certain claims and demands which he held on the said John McKay, and which amounted to about the sum of eight hundred dollars, and in which sum was included the said sum of three hundred dollars, with the interest thereon, which the said John McKay had agreed with the said Campbell to pay for the said tract of land; and that your oratrix consented to said proposition, upon condition that the said John McKay was willing to the said arrangement, and would promise to pay your oratrix his said indebtedness in some short time; to which arrangement, the said John McKay, being present at the time, consented, and promised to pay your oratrix in some short time; and, upon the faith of his said promise, your

oratrix accepted the said claims and demands, in payment of her said demands against the said John D. Campbell, and gave up to the said Campbell his notes and other evidences of indebtedness which your oratrix held against him. And your oratrix avers, that the said John McKay did not pay said indebtedness in his life-time, nor has his administrator paid it since his death, nor any part thereof; and that the same, with the interest due thereon, is still due and unpaid. And your oratrix insists, that she has a lien upon the said tract of land for the payment of the purchase-money, to-wit, the said three hundred dollars, with the interest thereon; and she further insists, that by the transfer of said debt of three hundred dollars by the said John D. Campbell to your oratrix, she was substituted to all his rights as vendor, and that she has a right in equity to foreclose her equitable lien upon the said tract of land."

The prayer of the bill was, that an account might be taken of the purchase-money due, with interest thereon; that a lien on the land might be declared in favor of the complainant, for the amount so ascertained to be due to her; that the land might be sold to pay the amount, in default of payment being made within a specified time; and for other and further relief according to the nature of the case.

Magruder filed a demurrer to the bill, and assigned the following as grounds of demurrer: "1st, that the complainant has not by her said bill made such a case as entitles her to any discovery or relief in a court of equity against this defendant; 2d, that it appears by the said bill that the complainant's remedy is barred by the lapse of time; 3d, that the said bill does not embrace the whole matter; 4th, that the complainant is not entitled to the relief which she has prayed; 5th, that the general prayer for relief does not entitle the complainant to any relief; 6th, that the complainant has no interest in the subject, or title to the land; 7th, that, even if complainant has an interest in the subject, this respondent is not answerable to her, but to the person in whom is the legal title to the land, if any one; 8th, that there is a want of proper parties defendants, in that John D. Campbell is a necessary party in his own

right, and the infant heir of said John C. McKay, deceased, who was a son of said John McKay, is also a necessary party; and, 9th, that the bill is multifarious, and improperly confounds together distinct demands." In passing on the demurrer, at the November term, 1858, the chancellor delivered an opinion, in which he noticed most of the points presented, and held that John D. Campbell was a necessary party in his own right, and that the bill made him a party only in right of his wife, as one of the heirs of John McKay; and further, that the infant heir of John C. McKay, deceased, who was a son of said John McKay, was a necessary party, and was not properly made a party by the prayer for subpœna against his guardian. He therefore made a decretal order, "that a decision upon said demurrer stand over, to the end that the plaintiff apply to amend his bill, so as to make said persons parties." The bill was amended accordingly, at the same term.

A guardian *ad litem* was appointed for the infant John McKay, before the bill was amended, and a formal answer was filed by the guardian; but, after the bill was amended by making him a party, and a subpœna on the amended bill was returned executed as to him, the record does not show any further proceedings against him until October, 1859, when another guardian *ad litem* was appointed in the stead of the first, who had removed from the county. Decrees *pro confesso*, on both the original and amended bills, were regularly entered against all the adult heirs of John McKay, deceased, one of whom was his daughter Susan McKay. The defendant Magruder filed an answer, denying all knowledge of the alleged contract between John D. Campbell and John McKay; averring, by way of plea, that such contract, if any was made, was verbal merely, and did not create any vendor's lien in favor of said Campbell; averring, also, that if any such contract was made, McKay was able to pay the debt, and did pay it before the 1st January, 1853; denied the alleged transfer by John D. Campbell to the complainant, or that it passed any vendor's lien; averred that the agreement between the complainant, John D. Campbell, and McKay, as alleged in the third paragraph of the bill, "if any such agreement was made, was in all

its parts a parol agreement, and no writing existed between the said John D. Campbell and McKay in regard to the said lands, or the payment of the purchase-money, and any transfer that may have been made to the complainant was only a transfer of a parol contract in regard to land, and no vendor's lien was created or passed to the complainant"; admitted that McKay died in possession of the land, and averred that he had at least a perfect equitable title, which title was acquired by respondent by his purchase at the administrator's sale; averred, also, that both John D. Campbell and the complainant had notice of the administrator's sale, and neither made any objection, nor gave notice of the claim set up in the bill, although John D. Campbell was present at the sale; averred, also, that McKay had the continuous and uninterrupted possession of the land for a period of at least fifteen years, and made valuable improvements; insisted on the lapse of time as a bar to the relief sought, and demurred to the bill for want of equity. He also prayed that his answer might be taken as a cross bill against his co-defendants and the complainant, and that the legal title to the land might be vested in him by a decree of the court.

A formal answer to the cross bill was filed by the guardian *ad litem* of the infant, John McKay; and a joint answer was filed by all the adult defendants, including the complainant in the original bill. The material allegations of the answer are the same as those of the original bill, except the following statement: "Defendants admit, that the said contract between John D. Campbell and John McKay, for the sale of the said tract of land, was made in 1841; and that so far as a conveyance of the land was concerned, *that* rested in parol; but they state, that the said John McKay gave his note to the said John D. Campbell for the purchase-money, with other sums which he was owing to him; which note was renewed from time to time, and other sums added to it, and which note was finally delivered up to said John McKay at the time complainant agreed to accept, in lieu of her demands against the said John D. Campbell, the indebtedness of the said McKay to said Campbell."

The complainant took the depositions of Mrs. Sarah McKay, who was the widow of said John McKay, and of Susan McKay, who was his daughter and a defendant to the bill. The record does not show any order for the examination of said Susan McKay as a witness. The defendant Magruder objected to the competency of these two witnesses, "because, if the allegations of the bill be true, the complainant has a subsisting debt against the estate of said John McKay, deceased, of which they are heirs and distributees, and they are therefore interested in enforcing a lien on the land, thereby making the land pay what otherwise they will lose as heirs and distributees of the estate." At the May term, 1860, the chancellor sustained the objections, and suppressed the depositions; but, at the May term, 1861, he suggested that his decision was erroneous, and allowed the complainant to apply for a revocation of the order; and at the November term, 1861, application having been made, and notice thereof given, he set aside and annulled the order.

The cause was submitted for a decree on the pleadings and proof, at the November term, 1860, and was held for consideration by the chancellor until the next May term, when, coming to the conclusion that the suppression of the depositions of Sarah and Susan McKay was erroneous, he made a decretal order, setting aside the submission, and restoring the cause to the docket, in order that the complainant might apply to have the order annulled. The complainant died in March, 1861, after having made and published her last will and testament, which was duly admitted to probate, and of which said John D. Campbell was appointed and qualified as executor. On the 20th June, 1861, said John D. Campbell, as such executor, filed a bill of revivor, and made the will of his testatrix an exhibit to it. Mrs. Sarah McKay, who was a sister of said testatrix, and her four children, who were defendants to the original bill, were the residuary and principal legatees under the will. The cause was again submitted for a decree on pleadings and proof, at the November term, 1861, and the defendant Magruder again objected to the depositions of Sarah and Susan McKay. At the same

term, the chancellor rendered a decree for the complainant, declaring a lien, ordering an account, &c.; and he overruled the objections to said depositions.

On the first submission of the cause, as the note of the evidence shows, the complainant offered in evidence "Exhibit A" to the original bill, which was a copy of the deed from Hodnet to John D. Campbell; to which the defendant Magruder objected on that account, but the chancellor overruled his objection. On the second submission of the cause, the exhibit was not offered in evidence; nor was any other evidence of said deed introduced, so far as the minute of the testimony shows. There were numerous objections to testimony, which require no particular notice.

At the May term, 1862, the master made his report under the reference, and it was confirmed. At the same term, by leave of the chancellor, Magruder filed an "amended and supplemental answer", in which he averred, that the suit was prosecuted, since the death of the original complainant, for the benefit of the residuary legatees and devisees under her will, who were co-defendants to the bill with him, and who, as the distributees and heirs-at-law of John McKay, deceased, had received the benefit of the money which said Magruder had paid on his purchase at the administrator's sale; and he pleaded these facts as an equitable estoppel. The chancellor held, that the new matter thus set up was no bar to the relief sought by the bill; and he therefore rendered a final decree in favor of the complainant, and ordered a sale of the land, in default of the payment, by a day certain, of the amount ascertained to be due on account of the unpaid purchase-money.

The appeal is sued out by Magruder alone, and the following errors are assigned by him: "1st, the chancellor erred in not sustaining the demurrer to the bill; 2d, in neither sustaining nor overruling the demurrer, and in permitting the plaintiff to amend the bill, without motion to that effect by plaintiff, and without costs or other terms; 3d, in suppressing the testimony of Reuben and William Kelly; 4th, in overruling the objections to the testimony of Anderson; 5th, in overruling the objections to the testi-

mony of Boone; 6th, in allowing the exhibit to the original bill to be read in evidence, without proof of the original deed; 7th, in the decree rendered at the May term, 1860, vacating the order of submission; 8th, in the decree setting aside the order suppressing the depositions of Sarah and Susan McKay; 9th, in allowing the testimony of Sarah and Susan McKay; 10th, in the decree rendered at the November term, 1861; 11th, in appointing Fielder guardian *ad litem* of John McKay, and in filing his answer; 12th, in the final decree rendered; and, 13th, in not dismissing the bill." There is a joinder in error on the part of the appellee.

N. S. GRAHAM, for appellant.—1. The facts on which the equity of a bill rests, must be averred with certainty, clearness, and precision, so that the court may see that the plaintiff has such rights as will warrant its interference, and the defendant be enabled to know what he is called on to defend.—*Cockrell v. Gurley*, 26 Ala. 405; *Jones v. Cowles*, 26 Ala. 612; *Read v. Walker*, 18 Ala. 332; *Spence v. Duren*, 3 Ala. 251. This rule is enforced with great strictness, where the bill seeks to enforce a parol contract for the sale of lands.

2. Tested by the above rule of pleading, the bill fails to show a valid contract, or indeed any contract, between Campbell and McKay, for the sale of the land. It alleges that Campbell *permitted* McKay to enter and occupy without rent or charge, under an *agreement* to purchase at some indefinite future time. The relations which existed between the parties, and the embarrassed pecuniary condition of McKay, furnish the explanation of the transaction, and show that it was a mere gratuity, or act of friendship and kindness on the part of Campbell. Nor is the testimony any more certain and definite, as to the terms of the supposed contract, than the averments of the bill. Leaving out of consideration the depositions of Sarah and Susan McKay, there is an entire absence of proof as to any contract; and when admitting their testimony, no definite contract is shown. The testimony shows, too, one fact which is inconsistent with the alleged contract; that is, that

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McKay was in possession of the land in *January*, 1841, while the date of the alleged contract under which he went into possession is in *June*, 1841.—*Williams v. Barnes*, 28 Ala. 613; *Skinner v. Barney*, 19 Ala. 259; *Sims v. McEwen*, 27 Ala. 184.

3. The averments of the bill, as to the transaction by which the complainant became the owner of the supposed debt on McKay, are equally vague and indefinite. Instead of showing a valid transfer of the vendor's lien, if any existed, the inference is irresistible that the lien was waived. The bill avers, that the plaintiff "consented to the arrangement on the faith of said McKay's promise to pay in a short time"; and it says nothing of any note or writing. The answer to the cross bill first brings to light the important fact, that McKay had given his note to Campbell, and that said note was delivered up to him at the time of the alleged transfer of the debt to the complainant. If there was a vendor's lien in favor of Campbell, and if that lien could pass by a mere verbal transfer of the debt, (both of which propositions are denied,) these two facts show an express waiver of the lien. The promise to pay in a short time was taken in lieu of the lien, and the debtor's note was delivered up to him.—*Gilman v. Brown*, 1 Mason, 214; 4 Wheaton, 290.

4. Relief ought to have been denied on account of the staleness of the demand. Seventeen years had elapsed between the date of the alleged contract and the filing of the bill. The objection on account of the staleness of the demand was specified in the demurrer, and was also taken by plea and answer.—*Johnson v. Johnson*, 5 Ala. 90; *Juzan v. Toulmin*, 9 Ala. 663; *Wood v. Wood*, 3 Ala. 762. As the objection appeared on the face of the bill, it was available on demurrer for want of equity.—*Nimmo v. Stewart*, 21 Ala. 682.

5. The amended and supplemental answer set up facts which constituted a complete equitable estoppel, and which are not controverted. Magruder was an innocent purchaser, for valuable consideration, without notice of the claim now sought to be enforced against him. The parties interested in that claim stood by, and allowed him to pur-

chase, without giving notice of their claim; and now, after having received the benefit of the purchase-money paid by him, they bring forward an antiquated demand, which was never before heard of outside of their immediate family, and seek thereby to make him pay a second time for the land.

6. The infant John McKay, who was a necessary party to the bill, was never properly brought before the court. *Bondurant v. Sibley's Heirs*, 37 Ala. 565; *Clark v. Gilmer*, 28 Ala. 265.

7. Sarah and Susan McKay were incompetent witnesses for the plaintiff. Their testimony tended to increase the funds of the estate in which they were interested as distributees.

8. Exhibit A to the original bill was but a copy of the deed, and was not competent evidence.—*Portier v. Barclay*, 15 Ala. 439. Without it, there was no evidence whatever of the deed.

9. All the assignments of error are insisted on.

GUNN & STRANGE, *contra*.—1. That no note was given by the purchaser, does not affect the vendor's right to enforce his lien for the unpaid purchase-money.—*Crawford v. Barkley*, 18 Ala. 271.

2. The statute of frauds does not apply, where the purchaser takes possession, under a parol contract, with the consent of the vendor. Part performance takes the case out of the statute.—*Brewer v. Logan*, 19 Ala. 481; *Danforth v. Herbert*, 28 Ala. 274.

3. The vendor's lien passes by a transfer of the debt, and may be enforced by the assignee in his own name.—*Conner v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 370; *Griggsby v. Hair*, 25 Ala. 327.

4. The statute of limitations is no bar to the relief sought. *Driver v. Hudspeth*, 16 Ala. 348; *Duval v. McLoskey*, 1 Ala. 744; *Seabury v. Stewart & Easton*, 22 Ala. 207; *Sellers v. Hayes*, 17 Ala. 749.

5. Sarah and Susan McKay were competent witnesses for the plaintiff.—*Cook v. Patterson*, 35 Ala. 102; *Crawford v. Barkley*, 18 Ala. 270; Code, § 2302.

BYRD, J.—1. Magruder alone took the appeal, and assigns error; but there is a joinder in error by the appellee, which waives all objection to the form of the appeal or the assignments of error.

2. The eleventh assignment of error, although there is a joinder, cannot avail the appellant. Whether the guardian *ad litem* was properly appointed or not, is not a question in which he has any interest, or as to which, if the court below committed an error, he has any right to complain.

3-4. The 2d, 7th, and 8th assignments, raise questions within the discretion of the chancellor, and which are not revisable in this court.

The 6th is not well assigned, for "Exhibit A" to the original bill was not introduced in evidence on the final hearing, as appears from the note of the testimony offered.

5. The 1st, 10th, and 12th* assignments may be disposed of together. The original bill, as noticed by the chancellor, very loosely sets out the contract between Campbell and John McKay, as to the sale of the land in controversy. The second paragraph shows what was the "understanding" of Campbell; but it fails to allege, positively and distinctly, what was the agreement of the parties as to the sale of the land, or that McKay made any contract to purchase the land. It is not sufficient, in a bill setting up, or attempting to set up, a parol contract for the sale of land, to aver what was "the understanding of the parties" as to the terms of the contract. They should be set out with distinctness and certainty, so that the court may determine for itself the legal effect of the contract. Great precision and nicety are required in pleadings, whenever a parol contract for the sale of land is sought to be enforced. But, when the second paragraph of the bill is taken in connection with the third, and construed together, we are of opinion that the terms of the contract are, though loosely, averred with sufficient certainty to authorize a court of equity to enforce the lien of the vendor.

The evidence of the witnesses Anderson, Boone, Sarah and Susan McKay, barely makes out the material allegations of the bill. Catherine Campbell became the owner of the debt due from McKay to Campbell, for the land, after the

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fall of 1852 ; but there is no satisfactory proof of the terms of the contract under which she became the owner thereof ; yet, from the declarations of McKay, the vendee, made after that time, probably in 1854, (as appears by the testimony of Anderson,) she was then the owner of the debt, and had a lien on the land, which he seemed to fear he would not be able to extinguish by the payment of the debt.

The answer of Magruder admits, that John McKay was able to pay the debt before 1853, and insists that he did pay it ; but he wholly fails to prove the payment. Neither Magruder, nor the administrator of McKay, has pleaded the statute of limitations as a bar to this proceeding.

6. It was not necessary that John D. Campbell should have assigned the debt to Catherine Campbell in writing, or by the delivery of an account or written assignment. Judge Story (2 Equity Jur. § 104) says : "Any order, writing, or *act*, which makes an appropriation of a fund, amounts to an equitable assignment of that fund." And further in the same section, "An assignment of a debt may be by parol, as well as by deed. As the assignee is generally entitled to all the remedies of the assignor, so he is generally subject to all the equities between the assignor and debtor."

The assignment of the debt is an assignment of the lien, unless the latter is waived by the assignee, or it is expressly or impliedly agreed between the parties that it is not to pass to the assignee. There is no proof of any such agreement ; and although it is alleged in the bill that Catherine Campbell traded for the claim on John McKay, on his promise to pay in a short time, yet that is not a waiver of the lien, where no title to the land has passed from the vendor to the vendee ; and she was entitled, on the transfer of the debt, to all the equities of the vendor. Cases of implied waiver of liens have often arisen, where a title has been made to the vendee. There are many instances where a lien in such cases has been held to have been waived by implication ; but, in a case like this, we apprehend that only a waiver upon some consideration valid by law, or an act operating by way of estoppel, could defeat the right of the vendor, or any one claiming under him, to subject the land

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to the payment of the purchase-money. However this may be, we hold, that neither the allegations aforesaid, nor the purchase of the land by appellant, as shown in the pleadings and proofs, could defeat the lien of the vendor, or his assignee.—*Cowles v. Jones*, 26 Ala. 612; *Bradford v. Harper*, 25 Ala. 337; *Griggsby v. Hair*, 25 Ala. 327.

7. The competency of the witnesses Sarah and Susan McKay is maintainable upon the following decisions: *Cook v. Patterson*, 35 Ala. 102; 18 Ala. 270; *Rupert & Cassity v. Elston's Executor*, 35 Ala. 79. If the motion to suppress portions of their testimony had been granted, the result would still be the same as to the merits of the cause; and therefore it is unnecessary to pass on the ruling of the chancellor thereon. And this remark is applicable to the rulings of the chancellor on the exceptions of both parties to the testimony of the witnesses Reuben and William Kelly, William Boone, and Charles Anderson; for, if the chancellor had ruled in accordance with the desire of the appellant, upon the motion and exceptions, so far as they were well taken, it would not have affected the result.

Having disposed of all the material questions noticed in the brief of appellant's counsel, we are of opinion that he has failed to show any error in the record, and the decree of the chancellor must be affirmed.

DAY vs. PRESKETT.

[BILL IN EQUITY FOR REFORMATION OF TITLE-BOND, AND SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND.]

1. *Vendor's lien, and assignment thereof.*—A vendor's lien for the unpaid purchase-money of land, which is but an incident to the debt, passes to an assignee of the purchaser's note, in the absence of a stipulation to the contrary; but, if the vendor exchanges the purchaser's note, for the note of a remote sub-purchaser, which is also secured by a vendor's lien on the land, although that lien passes to him by the

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transfer, he can not set it up against the party from whom he received it, in defense of a bill for the reformation of his bond for title, and the specific performance of his original contract, but must become the actor in a separate proceeding.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE original bill in this case was filed, on the 31st August, 1857, by Milledge W. Preskett, against Stephen Day, Yancey McVay, and William D. Benson; and sought principally the reformation of a bond for titles, which was executed by said Stephen Day, to said McVay, on the 7th December, 1849, so as to make it include a part of the land which was omitted by mistake. The land sold by Day to McVay was the south-west quarter of section nineteen, in township seventeen, range twenty-three; while the land described in the bond for titles was the south-west quarter of the west half of said section. The purchase-money agreed to be paid by McVay was three hundred and twenty-eight dollars, for which he executed his three promissory notes, payable respectively on the first day of January, 1851, 1852, and 1853; the first note being for one hundred dollars, and the other two for one hundred and fourteen dollars each. The title-bond was conditioned to make titles on payment of the notes at maturity.

McVay went into possession under the contract, cultivated the land, and erected improvements; and he paid the first note for the purchase-money at its maturity, and the second some time after its maturity. In the latter part of the year 1850, or the first part of the year 1851, McVay sold the land to Preskett, the complainant, and assigned to him by written endorsement Day's bond for titles. The purchase-money agreed to be paid by Preskett was four hundred dollars, one half of which amount was paid in cash; and for the balance he gave his two promissory notes, for one hundred dollars each, payable respectively on the first day of January, 1852, and 1853. Preskett went into possession under the contract, and paid his first note at maturity; and some time in January, 1852, he sold the land to Glenn Barnett and Jeremiah Jennings, and executed to

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them his bond for titles. Barnett and Jennings agreed to give four hundred and ninety-five dollars for the land, and executed their four joint promissory notes for the amount; one of which notes was for one hundred and eight dollars, and was payable on the 25th December, 1852. Preskett delivered possession of the land under the contract, and, at the same time, or soon afterwards, transferred said note for one hundred and eight dollars to said Day, and took from him, as the bill in this case alleged, McVay's unpaid note for the balance of the purchase-money.

Day removed from the State, in the latter part of the year 1852, without having executed a deed to the land to any of the parties. The notes of Barnett and Jennings being unpaid, a bill in chancery was filed on the 28th March, 1853, in the names of Preskett and Day jointly, to subject the land to their payment; to which bill Barnett and Jennings were the only defendants. That bill alleged, that the said note for one hundred and eight dollars was transferred by Preskett to Day in discharge of his indebtedness to Day on account of his purchase of the land. A decree *pro confesso*, by consent, was entered against both of the defendants, on the 5th May, 1853; and the chancellor rendered a final decree in favor of the complainants, on the same day, and ordered a sale of the land by the register; the proceeds of sale to be applied first to the payment of the note transferred by Preskett to Day, and the balance, if any, to be paid on the notes held by Preskett. At the sale under the decree, W. D. Benson became the purchaser, at the price of twenty dollars; and the report of the sale having been confirmed by the chancellor, the register executed a deed to said Benson, dated the 3d October, 1853, conveying to him the interest of said Barnett and Jennings in the land. In March, 1854, Preskett obtained a judgment against Barnett and Jennings, on their unpaid notes for the purchase-money which he still held; and in November, 1854, as such judgment-creditor, he offered to redeem the land from Benson, and tendered to him the amount required by the statute; but Benson refused to accept the tender. Having entered an actual credit on his judgment, as required by the statute, Preskett brought an action of unlawful detainer

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against the tenant in possession, to recover the land ; but before trial the case was compromised, by Preskett paying Benson a specified sum, and dismissing the suit, and Benson executing to him a quit-claim deed to the land, and delivering the possession.

In all these conveyances and legal proceedings, the land was described as in the original title-bond from Day to McVay, the east half of the quarter-section being omitted. In March, 1855, Benson, as the agent of Day, instituted an action of trespass to try titles against Preskett, to recover the portion of the land which was thus omitted ; and Preskett then filed his bill in this case, asking an injunction of the action at law, a reformation of Day's title-bond to McVay, and, if necessary to perfect his title to the land, a corresponding reformation of the other conveyances and the chancery proceedings ; and he added the general prayer, for other and further relief.

On the final hearing, on pleadings and proof, at the November term, 1859, the chancellor rendered a decree for the complainant ; reforming the title-bond, enjoining the action at law, and requiring Day, or, on his default, the register, to execute a deed to the complainant, conveying the legal title to the land which was omitted by mistake. From this decree the defendant Benson appeals, and assigns as error the chancellor's decree and each part thereof,

CLOPTON & LIGON, for appellant.

GUNN & STRANGE, *contra*.

JUDGE, J.—That there was a mistake in the description of the land, in the bond for titles from Day to McVay, is not controverted ; and it is not contended that the chancellor erred in correcting it. It is insisted, however, that the chancellor did err in decreeing that Day should convey the land in question to the complainant below, without providing for the payment of that portion of the purchase-money which Day alleges is still due to him, on account of his sale of the land. The balance of purchase-money thus claimed by Day, it is said, amounts to between eighty and one hundred dollars, and is claimed to be due upon the note

of Barnett and Jennings for one hundred and eight dollars, which was executed by them to the complainant, for part of the purchase-money, on the re-sale of the land by the complainant to them, and which was transferred to Day, in exchange for a note held by him on McVay, for a balance of the purchase-money due to Day on the sale of the land by him to McVay.

Conceding, for the sake of argument, that a balance was due to Day on the note of Barnett and Jennings, still it affords no legal reason against the decree for specific performance, as made by the chancellor. The notes exchanged, as above stated, grew out of separate and distinct contracts, and, consequently, were separate and distinct debts. By the exchange, each party divested himself absolutely of the ownership of one debt, and became the proprietor of another and a different debt; so that it was not a transaction in which the debt of Day against McVay took a new form by renewal or extension. By the transaction, Day not only parted with his debt against McVay, but also with the vendor's lien which existed for its security; for such a lien, being an incident to the debt, necessarily accompanies a transfer of the latter, if there be no stipulation to the contrary.—*Conner v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 370.

It results, then, that there was nothing due to Day on the contract which the chancellor required him specifically to perform; but, if anything was due him, it was on the note of Barnett and Jennings, which, as before stated, grew out of a distinct and independent contract. It is true the vendor's lien for the security of the note of Barnett and Jennings passed to Day with the transfer of the note to him; but, if entitled to its enforcement, he should be the actor in a separate and distinct proceeding for that purpose.

The record, however, shows some facts in relation to this note on Barnett and Jennings, which it may not be improper to mention. The west half of the south-west quarter of the section was, at the instance of Day, subjected to sale for the payment of the note, under a decree in chancery, against Barnett and Jennings; but the land brought at the sale only twenty dollars. By the exercise

of due diligence, Day might have realized the whole of his debt from this sale, as the land was evidently more than worth it; or, if it had been necessary, he might, in the same proceeding, have subjected the entire quarter-section to the payment of the note, by making the proper allegations and evidence as to the mistake in his bond for title to McVay. Thus it appears that, by his own want of diligence, Day exhausted his lien, without realizing the full payment of his debt; and it also appears that the note itself was subsequently disposed of by him in a contract with Barnett and Jennings, by which he attempted to acquire the east half of the quarter-section, that had been sold by him to McVay, but not described in the bond for title by mistake. The position of Day, then, was that of a vendor, attempting to assert a lien, with neither debt nor lien existing in his favor.

The objection that the evidence does not correspond with the case made by the bill, cannot be sustained. The testimony supports the allegations of the bill substantially, and that is all that is required.—*Eldridge v. Turner*, 11 Ala. 1050; *Gilchrist v. Gilmer*, 9 Ala. 985.

Decree affirmed.

HORTON vs. POOL.

[MOTION FOR JUDGMENT ON AWARD.]

1. *Incompetency of presiding judge; selection of attorney to preside.*—When the presiding judge is incompetent to sit in a cause, and an attorney of the court is appointed, by consent of parties, to preside in his stead, (Code, § 640,) the record must affirmatively show that the person so appointed is an attorney of the court.
2. *Validity of award as statutory.*—To constitute a valid statutory award, (Code, § 2713,) it must be made by a majority of the arbitrators chosen by the parties: it is not sufficient that it is signed by the arbitrators and the umpire called in by them, when it shows on its face that it is made by the umpire alone, and that both of the arbitrators differed from him.

APPEAL from the Circuit Court of Perry.

THE bill of exceptions in this case, and the judgment-entry, both recite that the presiding judge, Hon. JAMES COBBS, "being disqualified to try the cause, by reason of his having been of counsel for the plaintiff, thereupon, by consent of both parties, WALTER L. BRAGG, esquire, was called to preside on the trial of the cause."

The appellant, William S. Horton, moved the said circuit court, at its November term, 1866, to enter a judgment in his favor, against Anderson J. Pool, *nunc pro tunc* as of the November term, 1865, on an award, which, with the submission on which it was founded, was in the following words:

"The State of Alabama, } This agreement, made and
Perry county. } entered into this the 27th day
of November, A. D. 1865, between A. J. Pool and W. S. Horton, both of the county and State aforesaid, witnesseth, that whereas, W. S. Horton, on the 24th day of February, A. D. 1863, sold nine negroes to said Pool, for the sum of seven thousand dollars, as evidenced by a bill of sale and promissory note executed by the parties; and whereas, a difference of opinion exists between the parties as to the obligation resting upon said Pool to pay for said negroes, and the amount of money that should be paid by him; Now, therefore, the said Horton and the said Pool agree each to select a man for the purpose of arbitrating the matter in dispute between them; and if the men so selected by them cannot agree, they shall select a third man, as umpire in the matter; and they further agree, that the decision of said arbitrators shall be final in the matter. In witness whereof, they have hereto set their hands and seals, this the 27th day of November, A. D. 1865."

(Signed by both parties.)

"Whereas, A. J. Pool and W. S. Horton, the parties to the submission to which this award is attached, agreed that the matter in controversy between them, and particularly set forth in said submission, should be decided upon the following evidence, to-wit, the bill of sale executed by

said Horton to said Pool, and a certain promissory note executed by said Pool to said Horton, copies of which are hereto attached, marked exhibits 'A' and 'B'; that neither said Pool nor said Horton should be examined touching the matter, and that no parol testimony should be introduced by either party, for the purpose of explaining said bill of sale and promissory note; and whereas, the said Pool and Horton further agree to waive the three days' notice of the time and place of trial to which they were entitled under the statute: Now, therefore, we, the undersigned, George P. Massey and David Keller, chosen as arbitrators by said Pool and Horton, for the purpose of deciding the matter in controversy between them, (said Massey having been chosen by said Horton, and said Keller by said Pool,) after being first duly sworn impartially to determine the matter to us submitted according to the evidence, and the manifest justice and equity of the case, to the best of our judgments, without favor and affection, carefully considered the evidence submitted to us, but could not agree as to the liability of said Pool to said Horton; (said Massey contending, according to the evidence submitted and unexplained, that said Pool was liable to pay said Horton the amount specified in said note, with interest, in gold or silver, and the said Keller contending, that the evidence showed that the transaction was a Confederate transaction, and that in order to ascertain the liability of said Pool to said Horton, the gold and silver standard should be applied to the same;) therefore, in pursuance of the submission, we selected A. R. Kelly as umpire to decide the matter in dispute. Said Kelly, after being duly sworn as the statute directs, and being fully advised as to the matter in controversy between said Pool and said Horton, as well as to the difference of opinion existing between the arbitrators aforesaid touching said matter of controversy, decided, that said Pool should pay said Horton immediately the sum of six thousand dollars in gold or silver, or its equivalent, and upon the payment of the same that said Horton should deliver up to said Pool his promissory note, a copy of which is hereto attached, marked 'B', as aforesaid. In witness whereof, the undersigned have hereto set their hands and

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affixed their seals, this the 28th day of November, A. D. 1865."

(Signed by said Massey, Keller, and Kelly.)

On the evidence adduced, all of which is set out in the bill of exceptions, but which it is unnecessary to notice, the court overruled the plaintiff's motion; and this ruling, to which an exception was duly reserved by the plaintiff, is now assigned as error.

J. R. JOHN, for appellant.

MOORE & BROOKS, *contra*.

BYRD, J.—The record should have shown affirmatively that the person chosen to preside on the trial of the cause in the court below, was "an attorney of the court."—Code, § 640. But, without determining whether the record so shows, we are satisfied that there is no error shown by the bill of exceptions, of which appellant can legally complain.

2. It seems that the umpire, selected as shown by the record, made the award. He did not agree with either of the other arbitrators, though they signed the award with him; and it *may be* difficult to say, whether they did so because they agreed to the award, or as a verification of the facts set out in the award. But we are of opinion, that the latter is the proper construction. The Code requires, (§ 2713,) that a majority of the arbitrators chosen by *the parties* may make an award. The award of an umpire is not a statutory award. This cannot be sustained as a statutory award, and therefore it is unnecessary to notice any other matter assigned as error.—*Tuskaloosa Bridge Company v. Jemison*, 33 Ala. 476. We intimate no opinion upon the other questions argued by counsel, as the one noticed is fatal to the award as a statutory one.

Judgment affirmed.

DENNIS *vs.* WILLIAMS.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR PURCHASE-MONEY.]

1. *Extinguishment of debt and vendor's lien.*—If the vendor, by subsequent agreement with the purchaser, surrenders the note given for the purchase-money, and accepts in exchange for it the note of a sub-purchaser, his debt on the original purchaser is thereby extinguished, and with it the accompanying vendor's lien.
2. *Tender of deed to purchaser, as necessary to perfect right to foreclose vendor's lien.*—When the purchaser's note contains a stipulation, that it is not to be due and payable until titles to the land have been made to him, a tender of such title, or some valid excuse for the failure to make such tender, is indispensable to the equity of a bill which seeks to enforce the vendor's lien; and such tender in the bill, unaccompanied by a valid excuse for the failure to make it before filing the bill, is not sufficient.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 31st day of March, 1859, by the heirs-at-law of Samuel P. Dennis, deceased, against Wilson Williams, Thomas J. Osborne, and Tilman V. Osborne; and sought to enforce a vendor's lien for the unpaid purchase-money of land. The land was sold by said Samuel P. Dennis, on the 11th January, 1843, to said Tilman V. and Thomas J. Osborne, at the price of three hundred dollars; of which amount, one hundred dollars was paid in cash, and for the balance, two promissory notes were given by the said Osbornes, of one hundred dollars each; and said Dennis executed to them his bond, conditioned to make titles when the purchase-money was paid. On the 11th August, 1849, Thomas J. Osborne, having purchased the interest of Tilman V. Osborne in the land, sold said land, together with another small tract, to Wilson Williams, and executed to him a bond, the condition of which was, "that the said Osborne shall make, or cause to be made, unto the said Wilson Williams, his heirs and assigns, a

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good and lawful title" to the said lands. Williams gave his five promissory notes for the purchase-money, four of which were payable absolutely on a day certain, and, as the bond for titles stated, were "to be paid before a title is required"; but the last, which was for two hundred and twenty-five dollars, and payable "by the 1st day of February, 1854", contained a stipulation in these words: "Provided that, by that time, the said Thomas J. Osborne make, or cause to be made, a title to the land specified in the bond bearing date with this, and not to be due until I obtain a good title to said land."

Some time in the year 1858, after the death of said Samuel P. Dennis, and after a patent for the land sold by him to the Osbornes had been issued in his name, his administrator surrendered to said Thomas J. Osborne the original notes for the purchase-money, and accepted from him in exchange the said note on Williams above described. The following are the allegations of the bill in reference to this exchange: "Your orators further show, that the said Tilman V. and Thomas J. Osborne did not pay their said notes, at maturity or afterwards, except in the manner hereinafter stated; * * * * that after the issue of the patent for the said tract of land, to-wit, some time in the latter part of the year 1858, the said Thomas J. Osborne induced your orator Andrew J. Dennis to take, in exchange for the notes given by them to the said Samuel P. Dennis, the said note of two hundred and twenty-five dollars, made by the said Wilson Williams; and that the said note is now held by him, as administrator of the estate of Samuel P. Dennis, deceased, in the lieu and stead of the said notes given by the said Tilman V. and Thomas J. Osborne; and [he] insists that the same in his hands remains and constitutes a lien upon the said land for the payment of the purchase-money." The bill offered to return to Thomas J. Osborne the said note of Williams, and averred a readiness and willingness to make to Williams a good title to the land originally sold by Samuel P. Dennis to the Osbornes.

Decrees *pro confesso* were entered against Tilman V. and Thomas J. Osborne. Williams answered the bill, admitting the material facts as above stated; but denying the

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existence of the alleged lien, averring his readiness and willingness to pay the note when he obtained a title to the land specified in his bond, and demurring to the bill for want of equity. On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without prejudice to the complainant's rights to institute new proceedings, either at law or in equity, on the note against Williams; holding that the vendor's lien for the unpaid purchase-money, as against the Osbornes, was extinguished by the acceptance of the note on Williams, and that the bill was prematurely filed, so far as it sought any relief under the note of Williams. The chancellor's decree is now assigned as error.

GUNN & STRANGE, for appellants.

GRAHAM & ABERCROMBIE, *contra*.

A. J. WALKER, C. J.—The representative of the estate of Samuel P. Dennis, deceased, holding the two notes of Tilman V. Osborne and Thomas J. Osborne, for one hundred dollars each, given for land, exchanged them with Thomas J. Osborne, for a note for two hundred and twenty-five dollars on Wilson Williams, a sub-purchaser of the same land. It is stated in the bill of the complainants, that the transaction was an exchange, and that the representative of Dennis held the note of Williams "in the lieu and stead" of the note on Tilman V. and Thomas J. Osborne, and claimed that it (the note on Williams) "is in his hands a lien on the land." It appears that the note on Williams was not endorsed to the representative of the estate of Dennis. In a part of the bill antecedent to the allegations in reference to the exchange of the notes it is said, that Tilman V. and Thomas J. Osborne did not pay the note on them, "at maturity or afterwards, except in the manner hereinafter (thereinafter) stated." From this glance at the complainant's bill it is apparent, that the note on Tilman V. and Thomas J. Osborne was transferred or exchanged to one of the makers; that this was deemed a payment of the note, and that a claim of lien was predicated upon the note received on the

exchange without endorsement, which is held "in lieu and stead" of the original note. The representative of Dennis has taken a note upon a stranger to the original debt, without endorsement, and surrendered the note evidencing the original debt; and the transaction is regarded by himself as a payment. There is scarcely any authority to be found, and certainly no principle can be stated, militating against the proposition, that the original debt was extinguished by the transaction above stated.

The proposition is intimated, *arguendo*, by this court, in *Bradford v. Harper*, (25 Ala. 337,) that the taking of a security on a third person, for a pre-existing debt, would be, *prima facie*, an extinguishment of it. The exigency of this case does not require us to go so far; and it is not our purpose to inquire whether, upon a smaller measure of proof falling within the limits of this case, the pre-existing debt would not be considered as discharged. There is, perhaps, no subject upon which there is a greater exuberance and contrariety of decision. Many of the cases may be found collated in the notes to the first section of the 7th chapter of 2 Parsons on Notes and Bills, pp. 150-164; see, also, Story on Prom. Notes, § 404. We refer to the following decisions, as going at least as far as is necessary to sustain our proposition, without adopting them: *Cole v. Sackett*, 1 Hill, (N. Y.) 516; *Waydell v. Luer*, 5 *ib.* 448; *S. C.*, 3 Denis, 41; *Elwood v. Deifendorf*, 5 Barb. 398, 408; *Frisbee v. Larned*, 21 Wend. 450; *Hughes v. Wheeler*, 8 Cow. 77; *Conkling v. King*, 4 Coms. 440; *Stone v. Chamberlin*, 20 Ga. 259; *Hutchings v. Olcott*, 4 Ver. 549. All the authorities agree, that if the note on a third person was in fact received in discharge of the original indebtedness, in the absence of fraud, the same is extinguished.—Story on Prom. Notes, *supra*; *Carriere v. Ticknor*, 26 Ala. 571; *Mooring v. Mobile Marine Dock & Mutual Insurance Co.*, 27 Ala. 254; *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439; *Cocke v. Chaney*, 14 Ala. 65.

2. The debt evidenced by the note of Williams, was, by its terms, not due and payable until title was made. A tender of title, or some excuse for its omission, was therefore indispensable to the equity of a bill asserting the ven-

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dor's lien for the payment of that note.—*Spoor v. Phillips*, 27 Ala. 193; *Freeman v. Jordan*, 17 Ala. 509.

The decree is affirmed.

MADDEN vs. GILMER.

[ACTION AGAINST HUSBAND AND WIFE, ON PROMISSORY NOTE EXECUTED BY WIFE BEFORE MARRIAGE.]

1. *Liability of husband for debts of wife dum sola*.—Under the provisions of the Code, (§ 1981,) the husband is not liable for debts contracted by the wife before marriage; consequently, in an action against husband and wife, founded on a promissory note which is averred in the complaint to have been executed by the wife *dum sola*, the husband only being served with process, a judgment by default against both of the defendants is erroneous, and will be reversed on a joint assignment of error by them.

APPEAL from the Circuit Court of Henry.

Tried before the Hon. JOHN COCHRAN.

THIS action was brought by John G. Gilmer, against Michael Madden, and Mary Madden, his wife, and was commenced on the 30th March, 1861. The complaint was in these words: "The plaintiff claims of the defendants two thousand one hundred and thirty-eight 87-100 dollars, due by promissory note made by said Mary Madden, while a widow, and named Mary Carmell, on the 8th day of April, 1857, to Robert Lundy or bearer, and payable by the first day of January next thereafter, with interest thereon; the said Mary Madden having a separate estate, acquired since the first day of March, 1848; and plaintiff avers, that he has the legal title to said note." The summons was returned executed on Michael Madden, and judgment by default was rendered against both of the defendants. The appeal is sued out in the names of both of the defendants, and errors are assigned by them jointly, as

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follows : " 1st, the judgment is erroneous as against Mary Madden, because she was not served with process ; 2d, the judgment is erroneous as against Michael Madden, because the complaint shows no cause of action against him."

MARTIN & SAYRE, for appellants.

JUDGE, J.—Section 1981 of the Code exempts the husband from all liability for the debts of the wife, contracted before marriage ; but provides that she may be sued alone for the recovery of such debts, and that her separate estate shall be liable to the satisfaction thereof, as if she were an unmarried woman. In an action for the recovery of such a debt, we held in *Zachary v. Cadenhead*, at the June term, 1866, that the wife must be sued alone ; that it was not necessary to aver in the complaint that she has a separate estate ; and that if judgment be recovered against her, the property, if any, constituting her separate estate, is liable for its satisfaction. The cause of action declared on in this case, shows no liability on the part of the husband ; and the wife not having been brought into court by the service of process upon her, the judgment must be reversed, and the cause remanded.

REPORTS
OF
CASES ARGUED AND DETERMINED
AT THE JUNE TERM, 1867.

EX PARTE ANDREWS & MOTT.

[APPLICATION FOR MANDAMUS TO CIRCUIT COURT.]

1. *Removal of pending suit from State into Federal court.*—To authorize the removal of a pending suit from the State court, in which it originated, into the Federal court of the district, under the provisions of the act of congress approved July 27, 1866, (Acts of 39th Congress, p. 306,) it must be shown that the suit “is one in which there can be a final determination of the controversy, so far as it concerns” the defendant applying for the removal, “without the presence of the other defendants as parties in the cause”; consequently, where the action is in tort against several defendants for a conspiracy, there can be no removal. (BYRD, J., *dissenting*.)
2. *Same.*—To authorize the removal of such suit under the provisions of the act of congress approved March 2, 1867, (Acts of 39th Congress, p. 558,) all the defendants must be non-residents of the State in which the suit is instituted.

APPLICATION by Rufus F. Andrews and Charles A. Mott, for a *mandamus* to the circuit court of Montgomery, Hon. GEO. GOLDTHWAITE, presiding, requiring that court to transfer to the Federal court of the district a certain suit pending in said circuit court, wherein Elmore, Keyes & Morrisett were plaintiffs, and said Andrews and Mott were defendants jointly with Richard Busteed. That action was commenced, as is shown by the transcript which was made an exhibit to the petition, on the 3d June, 1867; and the complaint was in the following words:

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“The plaintiffs claim of the defendants twenty thousand dollars, as damages for the wrongful, malicious, and corrupt confederation, agreement, and conspiracy with each other, to defraud and injure the plaintiffs as hereinafter set forth. During the November term, 1866, of the district court of the United States, for the middle district of Alabama, there were pending in said district court, in favor of said Mott, a suit in equity against Robert S. Williams and others, and two suits at law against said Robert S. Williams; and the plaintiffs in this present action were attorneys at law and solicitors in chancery, duly admitted, and were regularly retained and employed as attorneys and solicitors of said Mott, in each of said suits in said district court; and during said term of said district court, and whilst the plaintiffs in this suit were the attorneys at law and solicitors in chancery, duly employed and retained as such for and by said Mott, in the said suits of said Mott, the said Mott and the defendants in said suits of said Mott, which were in said district court, made a special agreement for the compromise and dismissal of said last mentioned suits; which last named agreement was afterwards fully complied with by said last named defendants; and after such compliance, to-wit, on the 13th May, 1867, the said Mott acted on and accepted said compliance, and dismissed his said suit in equity. Under the said special agreement for the said compromise and dismissal, and in pursuance of its terms, and in compliance therewith, the said defendants in said suits which were in said district court, by their duly authorized agents, delivered to said plaintiff Elmore, one of the attorneys and solicitors of said Mott, and as such attorney and solicitor, ten thousand dollars in gold coin of the United States, and a promissory note, executed by Thomas Williams on the 2d day of January, 1867, with interest from its date; and at the time of said delivery, the plaintiffs in this suit continued to be, and were, the attorneys and solicitors of said Mott as aforesaid; and from the time of said delivery, the said Elmore held the coin and note, delivered to him as aforesaid, subject to the lien which the plaintiffs, as attorneys and solicitors of said Mott as aforesaid, had and were entitled to thereon for the indebtedness

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of said Mott to them, for their retainer and services and work and labor as his said attorneys and solicitors as aforesaid, in said suits which were in said district court; which indebtedness of said Mott to them was, and is, five thousand dollars, and is wholly unpaid and still due. Afterwards, and whilst said Elmore was continuing to hold said gold coin and note as aforesaid, and after said dismissal of said suit in equity, the said defendants in this suit—that is to say, the said Busteed, Andrews, and Mott—well knowing the premises, and with notice of all the facts herein above stated, contriving and intending to injure and aggrieve the plaintiffs, and to prevent the payment of said indebtedness of said Mott to the plaintiffs, and to defraud them thereof, and of the said lien and security for the said indebtedness, and the payment thereof, conspired with each other, unlawfully, and by unlawful and corrupt means, and by the corrupt abuse of the office of judge of said district court, then held by said Busteed, and by the usurpation of authority and power over said coin and note, as well as over said Elmore, by said Busteed as judge of said district court, which has never been vested in said judge or district court by the law of the land; and, in pursuance of said conspiracy, and in execution thereof, the said defendants, Busteed, Andrews, and Mott, did, by their unlawful and corrupt means aforesaid, and the usurpation aforesaid, and the corrupt abuse of the office aforesaid, deprive the said Elmore of the said coin and note, and did take control of said coin and note, and convert the same to their own use, whereby the plaintiffs have lost their said lien and debt, and have sustained damages to a large amount—that is, twenty thousand dollars, for which they here now sue.”

The summons was served on all the defendants on the same day on which it was issued. On the 25th June, 1867, said Andrews and Mott each filed his petition in the office of the clerk of said circuit court, addressed to the judge thereof, praying the removal of the cause into the Federal court of the district, on the ground that, “from prejudice and local influence,” they would not be able to obtain justice in said circuit court. Each of the petitions alleged, that the plaintiffs in the suit were citizens of Alabama, and

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the petitioners citizens of New York ; that the matter in dispute, exclusive of costs, exceeded five hundred dollars ; that the petitioner had reason to believe, and did believe, that, from prejudice and local influence, he could not obtain justice in said circuit court ; and each was accompanied by an affidavit, made before the clerk of the United States district court, in which the petitioner swore to the truth of the facts stated in the petition. The following quotations, the first being taken from the petition of Andrews, and the second from the petition of Mott, show the only differences between the two petitions : "And petitioner prays, that said suit may be removed into the next *district* court of the United States, to be held in the district where said suit is pending ; and he herewith offers good and sufficient security for his entering in said court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit." "And petitioner prays, that the said suit may be removed into the next *circuit* court of the United States, to be held in the district where the said suit is pending ; and your petitioner offers good and sufficient surety for his entering in said United States court, on the first day of its session at the next ensuing term thereof, copies of all processes, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as by the act of congress approved July 27, 1866, entitled 'An act for the removal of causes in certain cases from State courts,' and an act of congress amendatory of said act, approved March 2, 1867, are required to be done by your petitioner, as defendant as aforesaid, upon the removal of a suit into the United States court as aforesaid."

On the hearing of the motion, on the 26th June, 1867, as the bill of exceptions shows, it was proved to the court, that the plaintiffs were citizens of Alabama ; that the petitioners were citizens of New York ; that Richard Busteed was a citizen of Alabama ; and that the amount in controversy, exclusive of costs, was over five hundred dollars. The bill of exceptions states, also, that the petitioners "offered good and sufficient surety for their entering in said United States court, at the first day of its session, copies of the summons

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and complaint, and all pleadings, depositions, testimony, and other proceedings in said suit." Both the bill of exceptions and the judgment-entry state, that the petitioners asked the removal of the cause into the *circuit* court of the United States. The circuit court overruled the motion, and the petitioners excepted to its decision.

F. BUGBEE, and J. Q. SMITH, for the petitioners.

WATTS & TROY, and RICE, SEMPLE & GOLDTHWAITE, *contra*.

A. J. WALKER, C. J.—An action in tort was brought by citizens of the State of Alabama, against three defendants. Two of the defendants, alleging that they are citizens of another State, and that the amount in controversy exceeds five hundred dollars, asked of the court below a transfer of the cause into the circuit court of the United States. The circuit court overruled the application, and motion is now made to this court for a *mandamus*, requiring that the application for removal should be granted. A careful consideration of the subject fully convinces us, that the ruling of the circuit judge was correct, and that he could have made no other ruling, consistently with the practice and decisions in the Federal tribunals.

There are two acts of congress, to which the application for a transfer may refer. Those two are the act approved July 27, 1866, and the act approved March 2d, 1867. The right to a transfer under each of these acts we will consider in the order of their dates.

The act of congress of 27th July, 1866, provides, that when there is a suit in a State court, in favor of a citizen of the State, against another citizen of the State and a citizen of some other State, and the matter in dispute exceeds five hundred dollars, a transfer of the cause, as against the defendant who is a citizen of another State, may be had upon the prescribed application and conditions, "if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause." One essential element of the case for a transfer is, that after the removal of the cause, as to the defendant who is a citizen of

another State, "there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants." The controversy here intended is the dispute between the parties. To ascertain what is the controversy or dispute, we must inquire what is asserted and denied, what is claimed and resisted. If there cannot be a final determination, after the removal as to the defendants seeking it, of what is asserted and claimed by the plaintiff, then the above specified element of a case for removal is wanting. We must, then, inquire what the plaintiff asserts and claims.

The action is in trespass on the case, for an injury to the plaintiffs, to do which the three defendants are alleged to have conspired. The question, what is the controversy or dispute in such a case, is settled by Judge Story, in a luminous and elaborate opinion in the case of *Smith v. Rines*, 2 Sumner, 338. In that case, one of several defendants, being a citizen of another State, in an action strikingly analogous to this, asked a transfer to the Federal court; and Judge Story decided, that he was not entitled to it. The motion for a transfer in that case was made under the twelfth section of the act of 1789, and not under the acts in reference to which the motion here is made. We therefore do not refer to it as defining the class of cases embraced by the acts which we are considering. But Judge Story found it necessary, in reaching his conclusion, to examine the nature of the action, and to define the relations of the parties to it; and that part of his opinion has an immediate and obvious bearing upon the question under examination. It is decided in that case, upon indisputable authority and reasoning, that the plaintiff's right of action was joint or several, at his election—that he could proceed against all the wrong-doers, or against any one or more of them, at his election; that he had a right to proceed for a joint judgment against all the defendants, and that this right could not be taken away by the defendants. The opinion further ascertains, that the plaintiff has a right to seek a joint judgment for damages, and that the defendants have a joint and common interest in defeating the plaintiff's claim of a joint judgment against them. This opin-

ion but gives expression to an old doctrine of the common law. This is shown by the resolution in *Heydon's case*, (11 Rep. 5,) that "when in trespass against divers defendants, they plead not guilty, or several pleas, and the jury find for the plaintiff on all, the jurors cannot assess several damages against the defendants, because all is one trespass, and made joint by the plaintiff by his writ and declaration." To the same effect are the decisions of this court in *Lyman v. Hendrix*, 1 Ala. 212, and *Callison v. Lemons*, 2 Porter, 145.

It is clear, from the authorities above noticed, that the plaintiffs' demand is for a joint judgment against all the defendants, for the whole of which there would be a liability of each and all, to be enforced by execution. In this action, there is no assessment of damages separately against the defendants. The theory of it is, that the plaintiff has sustained damage, and for it demands by his complaint the joint liability of all the defendants. This is the controversy which the plaintiff, by his action, initiates. There can be no final determination of this controversy, if the case as to two of the defendants is segregated and transferred into another tribunal. Indeed, after such transfer, there can be no trial or determination of that controversy. It ceases to be a controversy in which the plaintiff strives for a joint judgment against all the defendants. By the transfer, he is absolutely precluded from making the demand, or asserting the right, which initiates and constitutes the controversy. The one controversy would become two by the transforming power of the law; in one of which, he would seek a judgment against one defendant, in the State court; and in the other, a judgment against two defendants, in the Federal court. It is clear that, in this case, there can be no final determination of the controversy as to two of the defendants, without the presence of the other. Judge Story, in *Smith v. Rines*, (*supra*,) demonstrates and illustrates the impossibility of a judgment as upon a joint cause of action, partly in the State court, and partly in the Federal court.

The act of 27th July, 1866, is a mere regulation of jurisdiction. It was not designed to deprive a party of any

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right which the law bestows, or of the privilege of demanding at the bar of some legal forum any judgment which the law gives him a right to demand. The plaintiffs have a legal right to demand a joint judgment against all the alleged participants in the tort, and to have a legal adjudication upon it. Of that legal right he would be stripped by the transfer of his case, as to two defendants, into the Federal court. The whole case can not be transferred into the Federal court, and there tried; because, one of the defendants being a citizen of Alabama, that court could have no jurisdiction as to him. The theory which would sustain the motion here, would, to the reproach of the law and the law-makers, develop a case where there is a legal right with no forum in which to assert it. This result, so hostile to justice, and so discreditable to our law, is avoided by the careful exception from the operation of the law of those cases where the controversy can not be finally determined without the presence of all the defendants; and in the avoidance of such a result that provision of the law was designed to operate.

The question may be asked, what class of cases falls within the scope of this act of congress, if this case does not. In the case of *Strawbridge v. Curtis*, Chief-Justice Marshall made an intimation, that while, as a general rule, jurisdiction dependent upon citizenship could only be sustained where all the parties on the same side were competent to sue, or liable to be sued; yet a different rule might prevail, where several parties represented several distinct interests, and some of those parties were, and others were not, competent to sue, or liable to be sued, in the courts of the United States. Judge Thompson, in *Ward v. Arredondo*, (1 Paine, 410,) intimated that there might be cases in equity where several parties represent distinct interests, so that separate decrees might be made, where possibly some of the parties might take the cause into the circuit court, and others remain in the State court; but that it ought, even in such cases, to be a very strong case of separate and distinct interests to sanction such a course. See, also, *Cameron v. McRoberts*, 3 Wheaton, 591.

Judge Story, remarking upon the antecedent cases

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touching this subject, said, "that all the cases in which a separate and distinct interest, or a nominal interest, is spoken of, were bills in equity, capable in their own nature of separate and distinct decrees, upon separate and distinct interests, where there was, or might be, no community of interest, and where the general question was presented as to the proper parties necessary to be made in a suit in equity"; but that "very different considerations do, or at least might, apply to suits at common law, where the nonjoinder or misjoinder of parties has a very different effect upon the character of the suit, and very different rules apply to it."

From these authorities it is apparent, that a class of cases had been mentioned in the opinions of the Federal judiciary, which ought to constitute exceptions to the general rule, that the character of citizenship requisite to give jurisdiction should be common to all the plaintiffs or defendants. That class embraced those cases where the interests of the parties were so entirely distinct, that a judgment or decree could be rendered in reference to a part without affecting the others. No distinct regulation was made in reference to those cases, until the act of 27th July, 1866, was passed; and it is a fair inference, that that act was designed to provide for those cases which had been the subject of judicial comment. In that class of cases we find a field of operation for the act of congress. Its operation must be chiefly confined to chancery cases, as intimated by Judge Story. It may be that actions at law may be found, either at common law, or authorized by statutes in some of the States, which would be included. It is probable that actions of ejectment may arise in a State court, where the interest of one defendant is so distinct as that it may be transferred without affecting the others. For example, in the case of *Rowland and Heifner v. Ladiga*, (21 Ala. 9; S. C., 2 Howard,) a plaintiff having the same title to an entire tract of land sued the two owners of distinct parts of it. If one of those defendants had been a citizen of another State, the suit might have been transferred as to him, because there was no community of interest between the two defendants, and no right in the

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plaintiff jointly against them. Our view leaves a clear and distinct operation for the act of congress in chancery cases. *Fleming v. Gilmer*, (35 Ala. 62,) presents a case in which a bill was held not to be multifarious, and yet the interest of at least one of the defendants was so distinct and separate from that of the other defendants, that it might have been taken out of the case, and transferred to another forum, without affecting the rights of the parties. Many more cases, of like character, might be adduced. Besides, it is often the case in chancery, that parties are proper but not necessary. When that is the case, the defendant in interest being a citizen of another State, and joined with a citizen of the State who was a mere formal party, a transfer could be made.

If we should take the view of the act of 1866 relied upon by the parties making the motion, we should regard the law as unconstitutional. The plaintiff's common-law right is to have his demand for a joint judgment passed upon. What provision of the constitution can be found, which gives to congress the power to take away that right? The constitution provides, that the judicial power of the United States "shall extend to controversies between citizens of different States." The judiciary act of 1789 gave the circuit courts jurisdiction, where "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." The act of 1789, therefore, does not occupy the entire ground of the constitutional power of the United States; for it requires that the party on one side should be a citizen of the State where the suit is brought. But there is a perfect accord and equality of extent between the constitution and the act of congress, in requiring that the two sides of the case should be occupied by citizens of different States.

It has been repeatedly held, under the act of congress, indispensable to the jurisdiction of the Federal court, that the citizenship requisite must be common to all the parties joining as plaintiffs, or joined as defendants. The only exceptions to the general rule ever intimated are cases, where the persons joined without the requisite citizenship were either merely nominal parties, or parties who did not pos-

sess such an interest as to prevent a decree or judgment being rendered without affecting them, for or against parties possessing the requisite jurisdictional citizenship.—Conkling's Treatise, 143, 155; *Ward v. Arredondo*, Paine, 410; *Strawbridge v. Curtis*, 3 Cranch, 267; *Smith v. Rines*, 2 Sum. 338; *Cameron v. McRoberts*, 3 Wheat. 591; *Beardsley v. Torrey*, 4 Wash. C. C. R. 286.

When the constitution says, that the judicial power of the United States extends to controversies between citizens of different States, it is in this regard to be construed in the same manner with the act of congress. It does not mean, that the controversy must be partly with citizens of different States. It must be under the constitution, as under the act of congress, wholly with citizens of different States. Where there is a plurality of plaintiffs, or of defendants, each one must possess the requisite character as to citizenship to sue or to be sued.—Conkling's Treat. 143. If the suit can be split up into distinct controversies, one or more persons possessing the requisite jurisdictional character, and being interested alone in a matter of controversy distinct and separate from those not possessing such character, could not be deprived of their right to the jurisdiction of the United States courts by the joinder of such other persons. This leaves the constitution to operate over the question of the jurisdiction of controversies, and not over questions of rights of action between man and man. The judicial power of the United States does not extend to cases in which citizens of a State sue citizens of the same State and citizens of another State, and the plaintiff's demand against all the defendants is joint, and incapable of separation and division by the defendants.

If it were doubtful whether the act of 1866 should be construed to embrace this case, it would be a judicial duty to maintain the constitutionality of the law by avoiding that construction; but we think it plain that the act of congress is not susceptible of such a construction.

2. We come now to consider the question of the right of the parties to the removal of the cause into the Federal court under the act of March 2d, 1867. This act provides, that a party plaintiff or defendant in a State court, being

a citizen of another State, upon complying with the other requisitions of the statute, and making a prescribed affidavit in reference to adverse prejudice or local influence, may obtain a transfer of the cause. The parties have made the prescribed affidavit, and insist that they are entitled to a removal of the cause under this act, if not under that of 1866. This act (March 2, 1867), unlike the other, contemplates the removal of the entire case, and not merely in so far as it affects the citizens of another State. Like the 12th section of the judiciary act of 1789, it directs that when the removal is made, the court shall proceed no further in the suit. Under the act of 1789 it is settled, that there could be no removal of the cause, when any one of the joint parties is a citizen of the State where the suit is pending.—*Smith v. Rines*, *supra* ; Conkling's Treat. 154 ; *Beardsley v. Torrey*, 4 Wash. C. C. R. 286. The rule is established in the jurisprudence of the United States, relative to suits instituted in its courts, and to suits removed under the 12th section of the judiciary act, "that when the jurisdiction depends upon the character of the parties, all the individuals composing the respective parties plaintiff and defendant must possess the requisite character." The same rule must be applied to removals under the act of 1867. There is nothing which can distinguish such removals from those under the act of 1789. The decisions upon the point are conclusive. A different ruling would lead to the absurdity of transferring the case, as to the defendant who is a citizen of this State, into a court which would have no jurisdiction of it, and yet forbidding the prosecution of the suit in the State court.

The motion for a *mandamus* is overruled.

BYRD, J.—I think it is too narrow and technical a construction to give the petitions and bill of exceptions, to hold that the application is for the removal of the suit as to all the defendants. It is true, that the petitioners might have been more explicit and definite ; yet, construing their application for the removal of the suit with reference to the acts under which it was made, it would harmonize more with our liberal system of judicial proceedings, to hold that

the application was made to remove the suit as to themselves ; and the fact stated in the bill of exceptions, that one of the parties defendant is a resident of this State, would indicate that such should be the construction of the application to remove the suit. In such preliminary proceedings, it is not usual to resort to much nicety or strictness in the interpretation of them, but a liberal construction will always be adopted to promote the ends of justice. I therefore think, that the application in the court below is sufficiently certain and definite, to entitle the petitioners to the removal of the suit as to themselves, if their application and affidavits bring them *within the provisions of the acts of congress of July, 1866, and March, 1867, and those acts are constitutional.* This disposes of the first objection to the granting of this application.

It is said that this case does not come within the scope of the acts of congress of 1866-67. It is evident that it is not included within the provisions of the 12th section of the judiciary act of 1789.—*Wilson v. Blodgett*, 4 McLean, 363 ; *Smith v. Rines*, 2 Sum. 338 ; *Strawbridge v. Curtis*, 3 Cranch, 267 ; *Beardsley v. Torrey*, 4 Wash. 286 ; *Dennison v. Potts*, 11 Sm. & Mar. 36 ; *James and Wife v. Thurston et al.*, 6 Rhode Island, 428.

The language of the last act is : "If a suit be commenced in any State court, against any alien, or by a citizen of the State in which the suit is brought, against a citizen of another State." I think that, upon this clause of this act, there can be no doubt of the correctness of the doctrine laid down in the cases cited, *to the extent* that, where the resident of a State was sued jointly with the resident of another State, the latter could not remove the case, as to himself, to the United States circuit court for the district where the suit was pending. And in my opinion, these decisions were the principal cause of the passage of the acts of 1866-67.

If Judge Story, in the case of *Smith v. Rines*, (2 Sumner,) had contented himself in putting that case upon this well-recognized doctrine, it would have relieved him from the learned discussion of the peculiar features of that case, which were very similar to those of this case. For it made

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no difference, whether the defendants were sued in an action at law, on a demand or tort which was joint, or joint and several, or several only. If one was a resident of the State where the suit was brought, the non-resident defendant would not, under the act of 1789, have any right to a removal of the cause as to himself. But even the *dicta* of that eminent jurist are justly entitled to great weight.

But it seems that, even under the act of 1789, a part of the defendants in a suit in equity might remove the suit, as to themselves, under certain circumstances, from the State to a Federal court, in the mode indicated in the case of *Ward v. Arredondo*, (1 Paine, 410,) and therefore the act of 1866 was not passed to apply to cases covered by that decision.

The act of 1866 provides, "that if any suit already commenced, or that may hereafter be commenced, in any State court, against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, a citizen of the State in which the suit is brought, is or shall be a defendant; and if the suit, so far as it relates to the alien defendant, or to the defendant who is the citizen of a State other than that in which the suit is brought, is or has been instituted, or prosecuted, for the purpose of restraining or enjoining him; or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause; then, *and in every such case*, the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause, as against him, into the next circuit court of the United States to be held in the district where the suit is pending," &c. It is unnecessary to set out any of the other provisions of the act, though they may be referred to hereafter.

An act amendatory of the above act was passed into a law on the 2d March, 1867; but I can see nothing in it which bears on the questions before us, except that the affi-

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davit in this case is, in substance, the one prescribed by the amendatory act.

No affidavit was required by the act of 1866; and it may be held that no application, made under it, should be granted, without the affidavit required by the act of 1867. However this may be, it seems to me that the filing of such an affidavit can not affect the right a defendant has, under the act of 1866, to a removal of the suit, as to himself; and, therefore, I will not notice this matter any further, and will proceed to consider whether the parties have brought themselves within the provisions of the act of 1866, or so much thereof as is above set forth.

The plaintiffs in this suit are residents of Alabama; the defendants, Andrews and Mott, are citizens of another State; Judge Busteed is a citizen of Alabama; Alabama is a State of the Union, and the circuit court of Montgomery county is a court of this State. So far the case is literally within the terms of the act. The matter in dispute "exceeds the sum of five hundred dollars, exclusive of costs." The defendants, Andrews and Mott, have filed their petition within the time prescribed by the act, for the removal of the cause, as against them, into the next circuit court of the United States, to be held in the district where the suit is pending, and offered to give the surety required to be given by the act. Therefore, the subject-matter is covered by the act of 1866, and the applicants have done and offered to do all that is required by the act, as a condition precedent to the right to an order of removal.

But it is said, that the suit is not one of the character, in which an order of removal is authorized by the act; and that part of the act in these words, "*or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause*", is relied upon in support of the above proposition. The material question in this case arises on the proper construction of this clause.

Can there be a "final determination of the controversy, so far as it concerns" Andrews and Mott, "without the presence" of Judge Busteed "in the cause"? There can be no question about the right of the plaintiffs at common

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law, and under the laws of this State, to bring an action of the nature of the one brought against the parties to this suit; and it is equally clear that the plaintiffs could have brought a similar action against each defendant in the State courts, and have a final determination as to him, without the presence of the other parties; or the plaintiffs could have brought an action against each or both of the non-resident defendants in the Federal courts, and an action against Judge Busteed in the State court, and have had a final determination, as far as each was concerned, without the presence of the other parties. If so, what prevents a removal of the cause as to Andrews and Mott, to the circuit court of the United States for this district? The act of 1866 provides, that "such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State court as against the other defendants, if he shall desire to do so"; which shows how careful congress was in protecting the rights of plaintiffs residing in a State where the suit is brought, while at the same time attempting to secure what in its wisdom was supposed to be the constitutional rights of non-resident defendants. This last recited clause of the act is persuasive to show that congress intended the act to apply to suits brought upon demands, or for torts, where the remedy against the defendants was either joint and several, or several. If several, this clause would be without meaning; but if joint and several, then it is most appropriate and applicable to such a suit. The words of the act, "in any suit", "in any State court", "and in every such case", are too broad to be confined to any class of suits or courts. It applies as well to suits on a cause of action which is joint, as on one that is joint and several; and as well to courts of law as courts of equity. The reasoning of the learned judges, in cases arising under the act of 1789, I submit, has no application to the language of the acts of 1866-67. I am therefore of the opinion, that those acts cover this case in all its parts; and the reasoning of Judge Story, in his *Comm-*

taries on the Constitution, fully sustains the views presented on this branch of the case.—Vol. 2, §§ 1690–5.

I have said that the acts of 1866 and 1867 apply to suits in which the cause of action is joint, as well as joint and several. But it only applies to such suits where there “can be a final determination of the controversy without the presence of the other defendant.” I know of no joint and several action where this cannot be done. But there are some joint causes of action which cannot be finally determined without the presence of all the defendants, or their representatives. Of this class is a suit in equity by one partner, against the others, to settle the partnership business; or a suit by a creditor of a partnership, or a suit by or against joint administrators, &c., unless some statutory provision authorizes a severance. It is unnecessary to enumerate the cases of joint causes of action, in which the law requires the presence of all the parties as necessary to the determination of the controversy; but it never requires their presence in the determination of causes of action which are joint and several. In the class of joint causes of action referred to, I find an ample field for the operation of the clause of the act of 1866, last above recited.

If this construction of the acts in question is correct, the further question of their constitutionality, or the power of congress to pass them, is presented for consideration. As the counsel for the applicants justly remarked in argument at the bar, this is a question of great delicacy at this period of our history. But still, it is one which must be fairly and unflinchingly met, discussed, and decided, whatever inferences, prejudicial to the court or judge, may be indulged by parties to either side of the late unfortunate and disastrous civil war.

The constitution of the United States (§ 2, art. iii) confers jurisdiction upon the Federal courts of controversies “between citizens of different States.” It has been settled by a long and uniform train of decisions, that the Federal and State courts have concurrent jurisdiction of controversies between citizens of different States, in such cases as congress by law has conferred such jurisdiction on the Federal courts. It is admitted, that the acts of congress have not

yet covered all the ground included within the power conferred by the 2d section of the 3d article of the constitution; for there is no act which authorizes the removal of a suit commenced in a State court, by a non-resident of such State, against a non-resident of the same State, or against a resident and non-resident of such State. Congress has not filled the measure of its power conferred by the constitution over this subject.—*Hubbard et al. v. The Nor. R. R. Co.*, 25 Verm. 715; *Welch v. Tennent et al.*, 4 Cal. 203. It seems to me that it would have been more consistent with principle, and would have worked more harmoniously in practice, if the courts had held that the jurisdiction of the Federal courts was exclusive in all cases where it is conferred by the 3d article of the constitution. The general, if not universal principle, applicable to courts of concurrent jurisdiction, is, that the one which first obtains jurisdiction is (as to the particular case) exclusive, so long as the suit is pending therein.

If, then, the State and Federal courts have concurrent jurisdiction over controversies between citizens of different States, it seems to me that the 12th section of the act of 1789, authorizing the removal of a suit from a State court, is in antagonism to the rule referred to. If the jurisdiction is concurrent, and it is sustainable in both courts under the constitution of the United States, why has the Federal government, any more than the State, the power by legislation to oust the jurisdiction of the court which first obtains jurisdiction? The one can do it, but not the other; and so it has long been settled, and must so remain. These concurrent powers of the national and State governments, and concurrent jurisdiction of the courts of the two governments, must always continue to be a source of trouble and difference, and occasionally of serious collisions. I am in favor, whenever it can be done without conflict with long established practice and principles, to restrict and diminish the sphere of the operation of this concurrent power and jurisdiction. See *Ad Hine v. Trevor*, decided by the supreme court of the United States, at December term, 1866.

It has been held, that where the State and Federal courts, by the constitution, have concurrent jurisdiction, congress

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may make it exclusive in the latter.—Curtis' Com. § 148, p. 197; 1 Kent's Com. 400-4; *Cohens v. Virginia*, 6 Wheat. 413. These views, I conceive, are substantially sustained by the authority of Story, Hamilton, Kent, and Marshall. 2 Story on Con. § 1774, 1690-4; *Cohens v. Virginia*, 6 Wheat. 413; 1 Kent's Com. 400-405; Federalist. The integrity, learning, patriotism, and legal and judicial opinions of these eminent and distinguished men, are the solid, massive, polished, and enduring pillars, upon which reposes the vast superstructure of American international and constitutional jurisprudence; and whatever beauty of expression, symmetry of proportion, unity of construction, and solidity of texture, are to be found in the splendid fabric, may be traced to the labors of the finished and comprehensive intellects of these master architects. This tribute is due from their countrymen, and I freely and most cheerfully award my share of it, in the face of the long and deep-seated prejudices which have existed and still exist in this country against them. And this I say the more readily, as it is in conformity to opinions entertained and expressed by me for the quarter of a century past.

If congress can make this jurisdiction exclusive, then it is competent for congress to enact a law, that a non-resident of a State shall not be sued in the courts of that State, and to provide by law that all controversies between a citizen of a State where a suit is brought in the State court, and a non-resident of such State, shall be brought in the circuit or district court of the United States held in such State, or in the State where the defendant resides; and if so, then congress had the constitutional power to pass the acts of 1866-67, as above construed. The lesser power is included in the greater. And I can conceive of no other rational theory upon which the constitutionality of the 12th section of the act of 1789, and the acts of 1866-67, can be maintainable.

As all citizens of the United States are, in one sense, citizens of each State, I have used the word "non-resident" in this opinion in the sense of "a citizen of another State" of the United States. But, if the authority of congress, under the constitution, to pass these acts, was *doubtful*, it

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would be our duty to sustain their constitutionality.—*Vide* 1 U. S. Digest, p. 553, § 1, and cases therein cited.

It is said that the plaintiffs have a right to bring a joint suit at law, and to try the right to have a joint judgment against the defendants, and that congress has no power under the constitution to deprive them of these rights. These are rights which pertain to the remedy; and while it is conceded that, in a case like this, the plaintiff has a right to bring a joint action, yet the right to a joint judgment depends upon the verdict; for the jury may find a verdict against some of the defendants and in favor of the others; and that is the question to be tried; and to say that he has a right to a joint judgment, as an argument against a removal of the cause, is a *petitio principii*.

As to the right to bring a joint action in the State court, in such a case as this, there can be no question; but, at the same time, the applicants in this case have a right, secured by the constitution, to have the controversy adjudicated in the Federal courts. And the matter comes to this, must the *constitutional* right of the applicants yield to the *common-law* right of the plaintiffs in the suit, or *vice versa*? In this collision of rights, it seems to me that the rights of the applicants must override the right of the plaintiffs above noticed, as the constitution declares itself and the laws which shall be made in pursuance thereof to be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding; and it is under the influence of this provision of the constitution that the laws of congress conferring exclusive jurisdiction upon the courts of the United States, where by that instrument it was left concurrent, are sustained and held to be valid.

This view does not, in this case, leave the plaintiffs without remedy. They can prosecute their suit in the Federal court against the applicants, and in the State court against Judge Busteed, as they would have been permitted to do if they had commenced, as they had a right to do, a suit against them in that court, and a suit against the latter in the State court. This view reconciles and harmonizes the

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rights of all parties under the law and constitution. And there is no hardship growing out of such a course, and no retrospective effect is given to the acts of 1866-67; for the cause of action arose, and the suit was brought, subsequent to the passage of those acts.

It is not at all times an easy matter to adjust and reconcile the rights of the people under our constitution, and frames of two governments, State and national; but it is our duty to approximate such a result as near as we can, and harmonize all conflicting and colliding interests of society and the rights and duties of the individuals who aggregately constitute, what is styled in our country, *the sovereign power*.

After a careful investigation and consideration of the questions involved in the decision of this cause, I am of opinion, that the applicants have shown themselves entitled to an order of removal from the circuit court, and that it is not a matter of discretion, and should be granted as a matter of right.—*James and Wife v. Thurston et al.*, 6 Rh. Isl. 428.

GRAHAM (ALIAS SMITH) vs. THE STATE.

[INDICTMENT FOR ARSON.]

1. *Arson in second degree; constituents of offense.*—To constitute the offense of arson in the second degree, by willfully setting fire to or burning "any cotton-house," &c., "which, with the property therein contained, is of the value of five hundred dollars or more," (Penal Code, § 152; Revised Code, § 3698,) it is not sufficient that the fire is applied or communicated to the property in the house: the house itself, or some part thereof, must be burned, within the common-law meaning of the word *burn*.
2. *Arson; proof of ownership of house; variance.*—Where the house alleged to have been burned is described in the indictment as the property of *Ely Sears*, while the evidence adduced on the trial shows that it belonged to *E. T. Sears*, neither the jury, nor the primary court, nor the appellate court, can presume the identity of the two names, without some proof the fact.

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3. *Personal presence of prisoner in court when sentence is pronounced.*—To sustain a judgment and sentence on conviction for a felony, the record must affirmatively show that the prisoner was personally present in court when he was tried, and when sentence was pronounced against him.

FROM the Circuit Court of Autauga.
Tried before the Hon. JOHN MOORE.

THE indictment in this case, which was returned into court on the 3d April, 1867, contained but a single count, which charged that the prisoner, Ira Graham, *alias dictus* Ira Smith, "willfully set fire to, or burned, a cotton-house of Ely Sears, which, with the property therein contained, to-wit, four bales of cotton, was of the value of more than five hundred dollars; against the peace and dignity," &c. The trial was had, at the April term, 1867, on issue joined on the plea of not guilty, when the defendant reserved a bill of exceptions, which, after stating that the solicitor read the indictment to the jury, and that the defendant pleaded not guilty, proceeded as follows:

"The State then introduced as a witness one E. T. Sears, who testified, that on the 20th day of March, 1867, he had near his dwelling-house, and about twelve or fifteen feet therefrom, a building constructed as follows: Four posts set in the ground, with a roof over the same made of rough-edge and inch plank; one side of which was closed in by plank nailed to the posts; and the other side was closed in by a rail fence; one end being enclosed by the railing around the yard, and the other end, which was next to the dwelling-house, being left open. Said Sears testified, that he had four bales of cotton stored therein; that said building, with the cotton therein, was worth more than five hundred dollars; that said bales of cotton were lying on their sides on some timbers, put there for that purpose; that on the night of the 20th March last, between the hours of eight and nine o'clock, one of said bales was discovered to be on fire; that the fire was extinguished after burning a small hole in the end of the bale, and before it had communicated to any part of the building. The evidence further showed, that this was in Autauga county;

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and tended to show that the defendant set it on fire, and that it was the property of E. T. Sears.

“The court charged the jury, that if they were satisfied, beyond a reasonable doubt, that the offense was committed in Autauga county, at the time stated by the witness, and that the building, with the property therein, was worth five hundred dollars or more, and that it was the property of E. T. Sears, and that the defendant willfully set fire to the cotton, and that the destruction of the cotton by the fire would necessarily destroy the building, then the defendant would be guilty, though no part of the building itself was burned.

“The defendant excepted to this charge, and then requested the court to instruct the jury—

“1. That to constitute the crime of arson, as charged in this case, it is necessary for the State to prove that the cotton-house, or shed in which the cotton was stored, or some part thereof, was set on fire or burned.

“2. That if the jury believed, from the evidence, that the building containing the cotton was not set on fire or burned, nor any part thereof, but only the cotton contained in the building, then they could not convict the defendant of arson.

“3. That if the jury believed, from the evidence, that only the materials or cotton bales in the house were set on fire or burned, and not the house or shed itself, then they must find the defendant not guilty.

“The court refused each of these charges, and the defendant excepted to their refusal.”

C. S. G. DOSTER, for the prisoner, cited Wharton's Amer. Crim. Law, 534; 3 Greenl. Ev. 54; 2 East's P. C. 1020, 1038; Roscoe's Crim. Ev. 274; 3 Ired. Law, 574.

JOHN W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—This indictment is founded on section 152 of the Penal Code, so much of which as is necessary for the decision of the questions raised by the charge given and the charges refused by the court, reads as follows: “Any person who willfully sets fire to, or burns, any church,

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meeting-house, court-house, town-house, college, academy, jail, or other building erected for public use ; or any banking-house, ware-house, *cotton-house*, gin-house, store, manufactory, or mill, which, with the property therein contained, is of the value of five hundred dollars or more," &c., "is guilty of arson in the second degree, and must, on conviction, be punished by imprisonment in the penitentiary, or hard labor for the county, for not less than two, nor more than ten years."

It appears from the record that E. T. Sears testified that, in March, 1867, he had near his dwelling-house, about twelve or fifteen feet therefrom, a *building* constructed as follows : Four posts set in the ground, with a roof over the same made of rough-edge and inch planks ; one side of which was closed in by plank nailed to the posts, and the other side was closed in by a rail fence ; and one end was inclosed by the paling around the yard, and the other end, which was next to the dwelling-house, was left open. Said Sears further testified, "that he had four bales of cotton stored therein ; that said building, with the cotton therein, *was* worth more than five hundred dollars ; that said bales were lying on their sides on some timbers ; that in March, 1867, between eight and nine o'clock at night, one of the bales was discovered to be on fire ; that it was extinguished after burning a small hole in the end of the bale, and before it communicated to any part of the building. The evidence tended to show that the defendant set it on fire, and that it was the property of E. T. Sears."

The bill of exceptions does not purport to set out all the evidence introduced on the trial ; but we will proceed to consider the charges refused by the court with reference to the evidence set out. For, upon that alone, if the jury believed it, they would have been authorized under the charges, if they had been given, to find the defendant not guilty as charged in the indictment.

The legal questions arising on this indictment and the evidence will be fully presented by reading so much of the above recited section of the Penal Code, *as follows* : "Any person who willfully *sets fire to*, or *burns*, any cotton-house, which, with the property therein contained, is of the value

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of five hundred dollars or more, * * * *is guilty of arson in the second degree.*" Among other questions arising under this provision of the law and evidence in this cause, and the important one to the defendant, is, whether a person who *sets fire* to a bale of cotton, within a house specified in the law, the fire being put out without burning any part of the house, is guilty, under the statute, of arson in the second degree.

In our opinion, the statute levels its denunciation at the act of setting fire to or burning the buildings named, and not at the contents thereof. The latter, though mentioned in the statute, only affect the degree of the offense of arson, whenever their value, and the value of the building, amount to five hundred dollars or more. If, therefore, a house described in the statute, which is not worth five hundred dollars, but with the contents is worth that sum, is burnt, and the contents are all saved; yet the defendant would be guilty of arson in the second degree, if all the other constituents of the offense existed. On the other hand, if the goods were all burned, whether of the value of five hundred dollars or not, and the house was not *burned* within the meaning attached to this word by the common law, the defendant would not be guilty. It is true it may be difficult for such a thing to take place, but it is not beyond the range of probability. It is the house or building, not the goods within it, which is the subject of the vindictory provision of the statute.

This view is enforced by the consideration, that the statute declares that the offender under it "is guilty of arson in the second degree." The word *arson* has a clear and well-defined meaning at common law, which lies at the basis of our civil and criminal jurisprudence; and it is to be presumed that the legislature employed the word in its legal signification. Mr. Bishop says, "Arson is an offense against the security of the habitation, rather than the property."—Vol. 2, § 39 (24).

The question, and the main one in this cause, is, whether the setting fire to the cotton within the building is a setting fire to the building within the meaning of the statute. There can be no doubt, that, if the building had been set on fire

from the burning of the cotton, then the defendant, if the other ingredients of the offense existed, would be guilty of arson in the second degree. Arson, at common law, is usually defined, "the willful and malicious burning of the house or out-house of another man"; or, as expressed by another author, "the malicious burning of another's house." The words "house", and "burning", have a technical meaning at common law. It is not necessary for us to notice the former, but it lies in our way to ascertain the meaning of the latter. In saying this, we do not intend to intimate that the "building" described by the witness in this case was a "cotton-house", within the meaning of the statute. If all the evidence introduced on the trial had been set out, it might have devolved on us to pass on that point.

Under an indictment against a person for arson at common law, it was sufficient to prove that any part of the house was burnt; and if the other constituents of the offense were proved, the offender could be convicted. The burning of any part, however small, completes the offense, the same as of the whole. If the portion of the house which is combustible is blackened by fire, but its fibres or texture is not wasted or destroyed by the fire, the offense is not complete.—4 Black. Com. 222; Amer. Crim. Law, p. 710, §§ 1659–62; 2 Russell on Crimes, 548; Roscoe's Criminal Evidence, 270; 1 Bishop's Criminal Law, § 325 (188).

It has been held, that the words "set fire to" are substantially synonymous with the word "burn", when used with reference to a house. Ordinarily, and in common acceptance, the phrase "set fire to" would be understood to convey a different meaning from the word "burn", when applied to a house, or anything else. A person might, in one sense, set fire to a house, or a powder magazine, without burning either; for a blaze would set one on fire and burn it, whilst it might not affect the other, although in contact.

Again, it may be argued with some force, that the legislature intended to convey a different idea by using the terms in the connection in which they are placed in the statute—"sets fire to, or burns"—for, if they are synonymical, why were both used? that the word "or" implies dis-

inction, difference, &c. To this it may be replied, that this form of expression is used to convey a variety of meanings besides the one designated; as, similarity, opposition, explanation, &c. It is allowable to say similitude or resemblance, vice or virtue, to destroy by fire or by burning with fire, &c. The conjunction used does not necessarily convey an idea of dissimilitude, distinction, resemblance, or identity. To set fire to a house mentioned in the statute is declared to be arson in the second degree; which is persuasive to show that there must be such a burning of the house as was necessary to complete the offense at common law. The statute does not read "set fire to, with intent to burn"; nor "set fire to the contents of the house, with intent to burn the house." If it read so, then it is clear that the sentence would have a different meaning from the word "burn."

Mr. Bishop says, (1 Crim. Law, § 326, (189,) that the words "set fire to" have not been minutely defined, but they mean substantially the same as burn. "There need not be a flame visible, yet there must be some consumption of the wood." He seems to think that the case of *The State v. Dennin* (32 Vermont, 158) holds a different doctrine. I hardly think so. The statute in that case uses the words "set fire, with intent to burn"; which seems to me to indicate, that the legislature intended to punish the offender, not for burning the house, but for *setting fire* with intent to burn. He might set fire, not "to" the house, but to *some thing else*, with intent to burn a particular house, and could be found guilty under the statute of Vermont. And in that case, the court, admitting the English doctrine on this question, distinguish that case from the English cases, by the difference in the language, and laying stress on the words "with intent to burn." However this may be, the English doctrine upon statutes similar to section 152 of our Penal Code, sustains the extract taken from 1 Bishop's Criminal Law, *supra*.

The statute of 9th Geo. I, c. 22, otherwise known as the "*Waltham Black Act*," uses the words "set fire to any house, barn, or out-house," &c.; which was extended by statute 9th Geo. III, c. 29, to the "malicious and willful burning or

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setting fire to all kinds of mills." The statute of 1st Vic. c. 69 uses the words, "set fire to." Our statute, in its present form, was passed subsequently to the English statutes, and to the decisions made thereon, hereafter cited; and it is to be presumed that the legislature adopted the language used in the statute, with reference to the adjudications made by the British courts upon the statutes referred to above.

The case of *Sarah Taylor*, (1 Leach, 58,) was decided in 1759, by Baron Legge, who, having doubts, submitted two questions to the consideration of the judges. It appears that the defendant was indicted for maliciously setting fire to a certain *outhouse*, commonly called a paper-mill. The evidence showed that the defendant had set fire to a large quantity of paper, which was drying in a loft annexed and belonging to the mill, and that no part of the mill was consumed. One of the questions submitted was, whether setting fire to paper in a drying-loft belonging to a mill, can be considered as setting fire to the mill? The indictment was founded on the "Black Act"; and in answer to the question, the judges of the court of king's bench all agreed, that the prisoner not having set fire to any part of the mill, and no part of the mill having been consumed, the defendant's case was not within the statute upon which she was indicted. The other question submitted was, whether a mill could be considered an *out-house* within the meaning of the 9th Geo. I, c. 22; but the court gave no opinion upon this question, which probably was the cause of the enactment of the 9th Geo. III, c. 29.

In *Breeme's case*, (1 Leach, C. C. 261,) the words used in the indictment were, "did set on fire, *and* burn"; and the court held, that the statute of Geo. I, c. 22, "did not vary the nature of the offense as it stood at common law."

In *Stallion's case*, (1 Moody, 398,) the defendant was indicted for "setting fire to an out-house"; and another count charged him with "setting fire to a coach-house"; and another charged him with setting fire to a building and erection used in carrying on the trade of poulterer. The evidence showed that "the building was formed by six upright posts, nearly seven feet apart, three in the front,

and three at the back"; that "these posts supported the roof; that there were pieces of wood laid from one side to the other; straw was put upon these pieces of wood, laid wide at the bottom, and drawn up to a ridge at the top. The straw was packed up as close as it could be packed; and the pieces of wood and straw *made the roof*." There was evidence describing the position of the house with reference to the dwelling, and one witness said, "that he should call the building in question an out-house." It was proved, that "smoke was seen to issue from the bottom of the roof"; that "there was a good deal of smoke in the straw; some handfuls of straw were pulled out; there were sparks in the straw when upon the ground; but no sparks were seen in the straw upon the roof; no flame was seen; a ball of linen was pulled out of the roof with the straw; * * the ball was burnt right through on one side; three or four pails of water were brought, and the fire on the roof was extinguished by throwing some of the water upon it;" * * * "several handfuls of straw were taken out of the roof, and there was burnt straw in some of these handfuls; and on examining the straw lying on the ground down by the building, there were some burnt ashes; and the ends of some of the straw were burnt," and some "had been reduced to ashes"; but "no part of the wood, either in the pieces on which the straw was laid, or in the posts of the building, was burnt." The cause was tried before Littledale, J. The defendant was convicted, and the judges, having passed sentence, thought it right to take the opinion of the judges of the king's bench, "whether the conviction were right." The opinions of the judges were requested on three questions, two of which were—1st, whether, in case the building were an out-house, the straw (as above described) was a part of the building; and, 2d, whether this was a setting on fire. The judges gave no opinion, further than to hold that the conviction was right. In this case it is apparent, that the straw was rightly held to be a part of the building; and a part of it having been consumed by fire, this ingredient of the crime was made out by the proof. The negative weight of this case, as authority in point, is apparent. It shows how careful th

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English judges were in construing the statutes referred to herein.

In the case of *Regina v. Parker*, (9 Car. & Payne, 45,) the defendant "was indicted for setting fire to the house of Edward Stammers." The evidence showed, "that the floor near the hearth had been scorched, and it was charred in a trifling way; it had been at a red heat, but not in a blaze." The witness, in answer to further questions, said, "that he had not examined the floor to see how deeply the charring went in; neither could he at all form a judgment as to how long it been done." On this evidence, Bosanquet, J., said to the jury, "we think this evidence is much too slight, and that you ought to require better proof that the house was on fire at the time in question."

In the case of *Maria Russel*, (Car. & Mars. 541,) the prisoner was indicted for "maliciously setting fire to the house of Ann Wright." The evidence was, in substance, that a small faggot was found lighted and burning on the boarded floor of the kitchen, about four feet from the hearth-stone. A part of the boards of the floor was scorched black, but not burnt. The faggot was nearly consumed, but no part of the wood of the floor was consumed. On this evidence, Cresswell, J., said, "I have conferred with my brother Patteson, and he concurs with me in thinking, that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported." And he further said, that it was not essential that the wood should be in a blaze.

It is unnecessary for us to notice thus particularly any further English cases bearing on the questions under discussion; and we will pass to a brief notice of a few American cases, after citing the following authors, who sustain and refer to the decisions above referred to, and others in approval of the same doctrine: 2 East's Criminal Law, 1020; 1 Hawk. P. C. p. 296, § 16; 1 Hale's P. C. 568, note 4; 2 Russell's Crim. Law, 555; Roscoe's Criminal Evidence, 270-4; 3 Archb. Cr. Pl. 493; Wharton's Amer. Cr. Law, 1658, *et seq.*

In *The Commonwealth v. Francis*, (Thach. Cr. Cases, 240,) a boat was set fire to within a shop or building; but the fire

did not extend to the building. The court say, that "maliciously to set fire to the building of another, is against the statute"; but, unless some permanent part of the house be burned, it did not come under the statute; though setting fire to an unfinished boat in a shop, with intent to burn the building, is a misdemeanor at common law. Such is our understanding of the points decided in that case, touching this question.

In the case of *Van Schaak*, (16 Mass. 105,) the words of the statute upon which the indictment was framed, were "willfully and maliciously set fire to the dwelling-house of another, or" &c. The evidence showed, that a board, a part of the exterior covering, was burnt. The court say, "The statute has left the burning to be defined by the common law; and by that, if any part of the dwelling-house, however small, be consumed, the offense is complete; and so it is with the statute." This case is only cited to show that the court, *in effect*, held that the proof necessary to sustain a conviction at common law, is necessary to sustain one under the statute. Such, we admit, is not the only construction to be given the decision.

The case of *The State v. Tennery*, (19 Ill. 436,) is a decision bearing indirectly on the question; and the case of *The State v. Dennin*, (*supra*,) bears more directly on it. In *Taylor's case*, (45 N. H. 322,) the court say, "The words 'set fire to', and 'burn', are generally understood as equivalent; and it is evidently used synonymously in our statutes."

The only case I have found adverse to the above authorities, is the case of *Howell v. Commonwealth*, (5 Grat. 664.) The learned judge (Lomax) makes an argument in that case, to show that the words "set fire to", and "burn", are not synonyms; and criticizes Mr. East's remark, that "he was not aware of any decision which had put a larger construction on those words (set fire to) than prevails by the rules of the common law; and the contrary opinion may be collected from what is said in *Spalding's case*, and *Breeme's case*, and in the case of *Sarah Taylor*", (2 East's C. L. 1020,) by saying, that "upon an attentive inspection of the authorities which he has referred to, it will be dis-

covered that there is nothing in these cases which decides that these expressions (to set fire to and burn) are identical in their meaning." With the highest deference to the opinion of Justice Lomax, it does appear to us, upon a careful reading of the cases of *Breeme* and *Sarah Taylor*, that they fully sustain Mr. East, unless the learned justice gives a more technical meaning to the word "identical", than we do. The cases referred to by him, to sustain the view he takes, are not in point; nor do they, with the weight of the very able and forcible reasoning of his opinion in that case, break down the authority and wisdom of the English adjudications upon this question, sustained as they are by the most learned jurists of that and this country. I have thought it proper to review the authorities, as has been done at some length, on account of the serious assault that has been made on them by the distinguished jurist named.

Upon the foregoing authorities, we come to the conclusion, that the words "set fire to," used in our statute, are equivalent to the word "burn" as defined by the common law; and when they refer to a house, that they mean that some portion of the same, however small, must be consumed, or destroyed by fire, in order to complete the offense of arson under section 152 of the Penal Code; and, therefore, the court should have given the first two charges asked by the prisoner.

Although the defendant can not be found guilty as charged in the indictment, if the facts on another trial should be the same as shown in the record; yet, under section 647 of the Penal Code, he *may* be found guilty of an attempt to commit arson, if the house is a cotton-house, or an out-house, within the meaning of that term by the common law; and be punished as provided by section 207 of that Code.—*Henry v. The State*, 33 Ala. 400, which is re-affirmed in *The State v. Lee & Norton*, 38 Ala. 217.

We yield any opinion we may have entertained of the interpretation of the words used in the statute, to the weight and wisdom of the enlightened judicial exposition given to them, and acquiesced in for more than a century.

2. The indictment avers, that the cotton-house belonged

to "*Ely Sears*." The evidence shows that it belonged to *E. T. Sears*. The charge of the court instructs the jury, that the defendant may be found guilty, if the house was the property of *E. T. Sears*, and the offense were proved. We can not presume that *Ely Sears* and *E. T. Sears* are the same persons; nor could the jury, or the court below, without some proof of the fact, if it is one.

3. The judgment-entry in this case does not affirmatively show that the defendant was personally present at the time sentence was pronounced or the trial took place, as required by law; and under the rule laid down in the case of *Eliza v. The State*, (39 Ala. 693,) and other cases decided by this court, a reversal would result.

This opinion disposes of all the material questions which are likely to arise on another trial; and it but remains for the court to say, that the judgment of the court below is reversed, and the cause remanded for further proceedings, and that the prisoner remain in the custody of the sheriff until discharged by due course of law. Let a judgment-entry be made accordingly.

BALKUM vs. THE STATE.

[PROSECUTION FOR ASSAULT.]

1. *Constitutionality of county courts*.—The county courts of this State, as established by the Penal Code of 1866, and presided over by the probate judges in their respective counties, are not violative of the 11th section of the 6th article of the constitution, which requires judges of the inferior courts to be elected by the people.
2. *Assault; charge as to constituents of*.—A charge, instructing the jury that, "if the prosecutor gave up his gun to the prisoner, through fear of bodily harm, reasonably excited in his mind by the conduct or manner of the prisoner, then the prisoner might be guilty of an assault," is not erroneous. (BYRD, J., *dissenting*, held, that the charge might have tended to mislead the jury, but, when construed in connection with all the evidence, was not so manifestly erroneous as to justify a reversal on account of it.)

FROM the Circuit Court of Henry.

Tried before the Hon. H. D. CLAYTON.

THIS case originated in the county court, on the affidavit of Wiley Ward, charging that, "on the 20th December, 1866, Alexander Balkum did assault him with a stick"; and the judge of the county court thereupon issued his warrant for the arrest of the defendant, addressed to any constable. The record does not show what proceedings were had in the county court. The bill of exceptions states, that the cause was sent up to the circuit court on appeal, and was tried upon the following complaint:

"State of Alabama, } In the Circuit Court, Spring term,
Henry County. } 1867.

"On appeal from the county court.

"The State of Alabama, by its solicitor, complains of Alexander Balkum, that within twelve months before the commencement of this prosecution, and since the 1st day of June, 1866, he assaulted Wiley Ward, against the peace and dignity," &c.

(Signed by the solicitor of the circuit.)

"On the trial, the State introduced Wiley Ward as a witness, who testified that, in December, 1866, he went to the house of J. W. Balkum in said county, near the residence of the defendant; that he was in conversation with said J. W. Balkum, James R. Ward, and E. J. Pitts, in the road near the gin-house of said Balkum, when the defendant came up, and commenced talking to him, by asking if he was carrying that gun for him; that he replied, that he was not; that the defendant then cursed him, and told him that he had heard he had said that he was going to shoot him; that he (witness) denied having said this; that the defendant had a stick in his hand, which he frequently changed from one hand to the other, but did not raise it, nor attempt to strike him with it; that he (witness) had a gun on his shoulder at the time; that he moved off a few steps from the defendant, and the defendant told him to 'put down that gun'; that the defendant then walked up to him, and took hold of the gun, saying, 'Give me this gun'; that witness gave him the gun, and he sat it down by a

tree; that the defendant then, being within three or four feet of witness, raised his hand as though he intended to 'grab me' (witness), and witness retreated; that the defendant then stamped his feet on the ground, as though he intended to frighten witness, and witness ran off. Said witness stated, on cross-examination, that he did not curse the defendant, and had not threatened to shoot him; that the defendant did not snatch or jerk the gun from him, but took hold of it, and witness gave it up to him; that the defendant, when he raised his hand, might have caught or struck him, and he thought that the defendant was going to lay hands on him; that he was not frightened, but knew that the defendant was a stouter man than himself, and retreated in consequence; that the defendant was not prevented from striking or seizing him, and did not run after him, nor try to catch him.

"James R. Ward, another witness for the State, testified substantially to the same state of facts, except that he said, that the defendant, after taking the gun from the prosecutor, raised his hand, and grabbed at the prosecutor, and that the prosecutor fled; and he stated on cross-examination, that the defendant did not grab at the prosecutor, but raised his hand to do so, and made a demonstration or effort in the direction of the prosecutor, and that no one prevented him from grabbing or striking the prosecutor. E. J. Pitts, a witness for the defendant, testified," in substance, to the same facts stated by the other witnesses, as to what occurred between the parties, up to the time when the prosecutor gave up his gun to the defendant; "that the defendant raised his hand, and the prosecutor ran off; that the defendant was near enough to strike him, but did not strike him, nor grab at him; that no person interposed to prevent him from striking; that there was no strife, nor scuffling, for the gun, and that the prosecutor gave it up without any resistance."

"The foregoing being all the evidence in the case, the court, after instructing the jury at the instance of the solicitor, further charged them, that if the prosecutor gave up his gun to the defendant through fear of bodily harm, reasonably excited in his mind by the conduct or manner

of the defendant, the defendant might be guilty of an assault. The defendant excepted to this charge, and then requested the court to instruct the jury, that if they believed the evidence, they must find the defendant not guilty. The court refused to give this charge, and the defendant excepted to its refusal."

W. C. OATES, for the prisoner.—1. That the affirmative charge of the court was erroneous, see *Murray v. The State*, 18 Ala. 727; *Felix v. The State*, 18 Ala. 720; *Blackwell v. The State*, 9 Ala. 82.

2. The charge asked was equivalent to a demurrer to the evidence.—*Parks v. Ross*, 11 Howard, U. S. 362; *Schulhardt v. Allen*, 1 Wallace, U. S. 359. The charge ought to have been given, because the evidence failed to show the consummation of the alleged offense.—3 Bla. Com. 120; 2 Greenl. Ev. § 83; 3 Greenl. Ev. § 59; Wharton's Amer. Crim. Law, § 1242; *Blackwell v. The State*, 9 Ala. 82; *Lawson v. The State*, 30 Ala. 15; *Johnson v. The State*, 35 Ala. 363; *Hays v. The People*, 1 Hill, 351.

3. The original affidavit and warrant, which were the foundation of the prosecution, charged an assault *with a stick*; and the averment was descriptive of the offense. *Smith v. Causey*, 22 Ala. 509; *S. C.*, 28 Ala. 655; *Lindsay v. The State*, 19 Ala. 560; *Johnson v. The State*, 35 Ala. 363. The case ought to have been tried in the circuit court, *de novo*; that is, there should have been a new trial on the same charge.—Penal Code, § 509. The "complaint" filed in the circuit court, in omitting the material averment as to the stick, made an entirely new case.

4. The whole proceeding was void. The original affidavit was made before "M. B. Green, judge of probate"; an officer who was not invested with authority to administer oaths in a criminal proceeding. The warrant of arrest was issued by "M. B. Green, county judge," and not by the judge of the county court. If the affidavit and warrant, or either of them, was unauthorized by law, the defendant could only have been tried upon an indictment or presentment by a grand jury.—Revised Constitution, art. I, §§ 7, 8, 9.

5. The whole proceeding was void, because the county courts, as established by the Penal Code of 1866, are unconstitutional. The constitution requires (art. vi, § 11), that the judges of inferior courts shall be elected by the people. The judges of the county courts, as established by the Penal Code of 1866, were legislated into office, without any election by the people. When the probate judges were elected by the people, their constitutional jurisdiction extended to probate and orphans' business; and it is to be presumed that the people, in electing them, were influenced in some degree, if not entirely, by their supposed qualifications for that kind of business. If the legislature could make those officers judges of the county court, and invest them with criminal jurisdiction, which the people never conferred on them; by parity of reasoning, they might confer judicial power on the sheriff, the tax-collector, or any other officer elected by the people.

JNO. W. A. SANFORD, Attorney-General, *contra*.—1. An assault is the commencement of an act, which, if not prevented, would produce a battery.—*Lawson v. The State*, 30 Ala. 14; *Johnson v. The State*, 35 Ala. 363. When the defendant impressed the prosecutor with a well-grounded apprehension of imminent peril, the offense was consummated.—1 Bishop's Criminal Law, § 409, and authorities cited; 2 *ib.* §§ 36-7.

2. The charge asked by the prisoner was properly refused, because the evidence was susceptible of a different construction from that placed upon it by the charge.—*Stanley v. Nelson*, 28 Ala. 514.

JUDGE, J.—A constitutional question is presented in this case—viz., that the legislature had not the power to establish a county court in the several counties in this State, and make the judges of probate *ex officio* judges of said courts; and that the county courts thus established, being independent courts of inferior jurisdiction, can be presided over by none other than separate judges elected for that purpose.

This question has been, in effect, decided at the present

term of this court. A county court, of different powers and jurisdiction from the county courts as now existing, was established by the legislature for the county of Montgomery, on the 24th of February, 1860; and the judge of probate in said county was made, *ex officio*, the judge of said county court.—Acts 1859–60, p. 564. On an appeal to this court, from a judgment rendered by the said county court, the question raised in the present case was presented; and we then held as follows: “No one questions the power of the general assembly to establish by law inferior courts with common-law jurisdiction, within a county, city, or district; and should it do so, we see no good reason why the legislature cannot authorize any judicial officer, who has been elected by the people, to preside in such inferior court, if such officer has been elected by the people under the jurisdiction of the court thus established.”—*Randolph v. Baldwin*, at the present term.

Similar legislation to that we are considering is not of recent origin, and has not been unfrequent in this State. At one period, the judges of the county courts, as then established, having common-law jurisdiction to a limited extent, were also required to keep in their respective counties a separate court of record, to be called “*The orphans’ court*”, which was vested with full jurisdiction of all testamentary and other matters pertaining to an orphans’ court, or court of probate. So, too, a court of record has long been established in each county of the State, styled, “*The court of county commissioners*”, of which the judge of probate is made the principal judge, and which has jurisdiction of county matters, in no way connected with the jurisdiction of a probate judge as such; and other instances might be cited, in which jurisdiction of matters properly pertaining to one court has been conferred by the legislature upon another, for concurrent exercise.

The act in question is absolutely binding upon us, until it is made unquestionably to appear that the legislature have mistaken their powers, and a clear incompatibility between the constitution and the law is established. We are unable to perceive that such incompatibility exists. The constitution gives to the general assembly the power

to establish courts of probate, "for the granting of letters testamentary and of administration, and for orphans' business"; but there is no prohibition against conferring upon such courts judicial cognizance of matters which are also within the jurisdiction of other courts.

2. We next proceed to inquire, whether the court below erred in the charge given to the jury, and in refusing to charge as requested. The charge of the court, it is true, is limited in terms to that portion of the transaction between the prosecutor and the defendant, which relates to the giving up of the gun by the former to the latter; but, it was left to the jury to determine, under the evidence, whether or not the gun was given up by the prosecutor, "through fear of bodily harm, reasonably excited in his mind by the conduct or manner of the defendant." If it was thus given up, the conduct of the defendant amounted to a *coercion* of its delivery, which, under the authorities, is an assault. It matters not that the gun was not delivered in consequence of *threats* by "*word of mouth*." It is a trite but true saying, that "actions speak louder than words"; and if the "conduct or manner" of the defendant produced a reasonable belief in the mind of the prosecutor that bodily harm would be inflicted upon him, if he did not deliver up his gun pursuant to the unlawful demand of the defendant, and the prosecutor yielded to such unlawful demand through fear, both reason and authority unite in pronouncing such coercion an assault. The effect upon the prosecutor of the "conduct or manner" of the defendant on the occasion, was a question of fact, *exclusively for the jury*, with whom the court very properly left it.—See *Richels v. The State*, 1 Sneed, 606.

The case of *Smith v. The State*, (7 Humphreys, 43,) is a direct authority in support of the correctness of the position announced, that the *manner* of a person charged with an assault may be sufficient evidence as to what was his intent in the transaction, even though threatening language in terms, and direct acts of hostility, be not resorted to. In that case, the defendant was indicted for an assault and false imprisonment. He was the keeper of a public ferry, and as such had carried over the Chucky river one Rodgers,

with his horse and carryall. When over, the defendant demanded of Rodgers ferriage, which the latter said had been paid. The defendant told Rodgers he should not go on until he had paid the ferriage. Some other conversation ensued, when Rodgers paid the ferriage demanded. Rodgers testified on the trial, that the defendant "*had not touched his bridle or his horse; that he made no effort to strike or touch his person or his horse; and that he made no threats of personal violence; but that he was afraid of a difficulty with the defendant.*" The defendant told Rodgers, after he had paid the charges, that if he had not paid it, he had determined to have put his horse and carryall back into the boat, and to have carried them back. The defendant was found guilty in the court below, and the judgment was affirmed. The supreme court of Tennessee, in their opinion, say: "Although the defendant did not take hold of the prosecutor, or offer violence to his person, *yet his manner may have operated as a moral force to detain the prosecutor.*" And this appears the more probable, as, after the affair was settled, the prosecutor inquired, what defendant would have done if he had not paid the ferriage demanded; to which the defendant replied, 'he would have put his carryall and horse back into the boat, and taken them across the river again.' As this determination existed in his mind, *it doubtless was exhibited in the manner of the defendant, and thus operated upon the fears of the prosecutor.*"

In the case before us, the defendant had as much the right to coerce the delivery to him of the prosecutor's hat, or his coat, or to compel him to strip, on the pretext that he was not dressed in the fashion, as he had to coerce the delivery of the prosecutor's gun; and it would be a reproach to the law, if one could coerce the performance of acts like these, through fear of bodily harm, excited in the mind of his victim, though not by actually striking at him, or by the use in terms of threatening language, and still be guilty of no offense. But the law is not so unreasonable as to permit one who thus breaks down the barrier it has erected for the security of the citizen, to go free of punishment.

We held, in the case of *The State v. Johnson*, (35 Ala. 363,)

which case is fully sustained by the authorities cited in the opinion of the court, that it is not necessary, to constitute an assault, that the defendant must actually *strike at* the person on whom the assault is charged to have been committed. "Raising a stick, with intention to strike, so near to the party assailed as to endanger his person ; and forcing him under a well-grounded apprehension of personal injury to strike in self defense, or to save himself by flight, is an assault, for which the party may be punished." So it was held, in the case of *The State v. Sims*, (3 Strobhart, 137,) that to ride a horse so near to one as to endanger his person, and create a belief in his mind that it was the intention of the rider to ride over him, would be an assault ; and this, whether the defendant *intended* to ride upon the prosecutor or not. In the case of *Hays v. The People*, (3 Hill, N. Y.) it was held by the supreme court of New York, Cowen, J., delivering the opinion, that to constitute an assault, "there need not be even a direct attempt at violence ; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient ;" and the learned judge quotes authorities, both English and American, to sustain his conclusion. So, where the defendant raised an axe, within striking distance of another, and said, "Give up the gun, or I'll split you down ;" and the person at the time did not give up the gun, but proposed some arrangement, upon which the defendant let the axe down, it was held, that he was guilty of an assault. Judge Gaston, in delivering the opinion of the court, said : "To hold that such an act, under such circumstances, was not an offer of violence,—not an attempt to commit violence—would be, we think, to outrage principle, and manifest an utter want of that solicitude for the preservation of peace, which characterizes our law, and which should animate its administration."—*State v. Morgan*, 3 Iredell, 186.

Without further comment, we refer to the following authorities, as sustaining in principle the charge of the court in this case : 2 Bishop's Cr. Law, §§ 49-50 ; *State v. Benedict*, 11 Vermont, 236 ; *Bloomer v. The State*, 3 Sneed, 66 ;

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The State v. Taylor, 3 Sneed, 662; *Keefe v. The State*, 19 Ark. 190; *State v. Davis*, 1 Iredell, 125. And see authorities cited in *Johnson v. The State*, 35 Ala. 363.

It follows, that the court did not err in the charge given, nor in the refusal to charge as requested.

Judgment affirmed.

BYRD, J.—I am not prepared to go to the length of *Smith v. The State*, (7 Humph. 43,) or any other case cited by the court which goes to the same extent. The case of *The State v. Johnson* (35 Ala.) goes as far as I conceive the standard authorities would justify. I assent to the result attained by the court, as to the charge given by the court below; but upon the principle, that the charge must be construed with reference to all the evidence, and when so construed in this case, although the charge might have tended to mislead the jury, yet it did not *so clearly* do so as to authorize us to reverse the judgment of the court. It was competent for the defendant to have asked such a charge as would have corrected any misapprehension which the jury might have entertained from the generality of the language used in the charge given.

DOMINICK vs. THE STATE.

[INDICTMENT FOR OBTAINING GOODS BY FALSE PRETENSES.]

1. *Former acquittal*.—An acquittal under an indictment for the larceny of goods, is no bar to a subsequent prosecution for obtaining the goods by false pretenses, although the same evidence is adduced by the prosecution in each case.
2. *Practice in joining issue on pleas of not guilty and former acquittal*.—When issue is joined on the pleas of not guilty and former acquittal, it is irregular to submit the two issues to the jury at the same time; but, if the defendant interposes the two pleas together, in a case of misdemeanor, and goes to trial on both at the same time without objection, he thereby waives the irregularity; yet, if the jury find a

verdict of not guilty, and fail to pass on the special plea, no judgment can be rendered against the defendant.

FROM the Circuit Court of Perry.

Tried before the Hon. JOHN MOORE.

THE indictment in this case, which was found in May, 1867, charged that the prisoner, Martin Dominick, "did falsely pretend to John W. Mackey, with intent to defraud, that he was authorized by one John Boyd to buy some goods from the said Mackey, and have them charged to the said Boyd, and it would be all right; and, by means of such false pretense, obtained from the said Mackey one pair of shoes, and two plugs of tobacco; against the peace and dignity," &c. "On the trial," at the same term, as the bill of exceptions states, "the defendant pleaded, in short by consent, former acquittal and not guilty; upon which pleas issue was joined by the State, and both pleas were submitted to the jury at the same time. Upon said issue joined on the plea of former acquittal, the defendant introduced in evidence the record of a trial had at the present term of the court, under an indictment against the defendant for the offense of petit larceny; which trial was had on issue joined on the plea of not guilty, and the defendant was found not guilty by a jury regularly sworn and empaneled, and judgment was accordingly rendered by the court, discharging him, as appears of record. It was admitted that, on said former trial, there was evidence to show that the offense charged therein was committed more than twelve months before the finding of the indictment; that no prosecution had been commenced against the defendant, within that time, for said offense, under the name of petit larceny; but that a prosecution had been commenced against him within that time, for the same offense, under the name of obtaining goods under and by false pretenses, by a warrant issued by the judge of the county court, sitting as a committing magistrate. It was admitted, also, that said former indictment was for stealing the identical goods, and none other, for which the present indictment was found, and was found by the same grand jury;

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that said first indictment was for identically the same offense, and none other, for which the present indictment was preferred; that identically the same evidence, and none other, was the evidence on which both of said indictments were found; that both indictments were for one and the same transaction; and that both trials were had on the same evidence, and none other, except that, in this case, the prosecution was shown to have been commenced within twelve months, and not in the other case. Upon the evidence and the record, the defendant insisted before the court, that he was entitled to a verdict of acquittal; which the court refused to direct, and the defendant excepted to the refusal. Then, after argument of counsel, the court charged the jury, amongst other things, that if they believed, from the evidence, that no prosecution was commenced against the defendant, growing out of the transaction of petit larceny, (and it was admitted that there was none, except for obtaining goods under false pretenses,) then it would be a legal impossibility to convict the defendant under said indictment for petit larceny, and his acquittal under that indictment would not prevent a conviction under this. To this charge the defendant excepted." The jury returned a verdict of guilty, and assessed a fine of five dollars against the defendant.

MOORE & LOCKETT, for the prisoner.

JOHN W. A. SANFORD, Attorney-General, *contra*.

A. J. WALKER, C. J.—“A former acquittal is no bar to a subsequent prosecution, unless the accused *could have been* convicted upon the first indictment, upon proof of the facts averred in the second.”—*King v. Vandercomb & Abbott*, 2 Leach's C. C. 708; *S. C.*, 2 Leading Criminal Cases, 542, 552; *State v. Johnson*, 12 Ala. 840; 1 Bishop on Criminal Law, 886.

Proof of the facts averred in the indictment for procuring goods by false pretenses, would not sustain an indictment for larceny. The constituents of the two offenses are not identical, and neither includes the other. It follows, therefore, that an acquittal of larceny can not be a defense to

an indictment for procuring goods by false pretenses. In England, one indicted and acquitted of obtaining goods by false pretenses, can not afterwards be indicted upon the same facts as for a larceny.—1 Archb. Cr. Pl. 112; *Regina v. Henderson*, 2 Moody, 192; *S. C.*, 1 Carr. & Marsh. 328. This results from a statute, allowing a conviction for larceny under an indictment for obtaining goods by false pretenses, as will be seen by reference to the cases cited above. It seems clear from the same authorities, as it is upon principle, that an acquittal of larceny does not protect against a prosecution for obtaining goods by false pretenses.—See 2 Leading Criminal Cases, 555.

The fact that an attempt was made to procure a conviction of larceny, upon the same evidence introduced to support the subsequent prosecution for obtaining goods by false pretenses, is no bar to a prosecution for the latter. 1 Bishop on Cr. Law, 896.

We do not think that any argument, in support of the plea of *autrefois acquit*, can be drawn from the practice in reference to an election by the State as between several counts of an indictment.

2. The practice of submitting to the jury the issues on the plea of *autrefois acquit* and not guilty, at the same time, has been pronounced by this court irregular, in the cases of *The State v. Nelson*, (7 Ala. 610,) and *Henry v. State*, (33 Ala. 389); but it has never been decided, that the irregularity constitutes a reversible error, when no objection was made in the court below. The defendant who pleads the two pleas together, thus tendering the two issues together, and goes to trial upon them together without objection, must be presumed, in such a case as this, to waive the irregularity. What our ruling would be in a case of felony, we do not decide. Upon the subject of submitting both the issues to the jury at the same time, we remark that it is better, in all cases, to have the issue on the plea of former acquittal always passed on before the plea of not guilty.

There must be a reversal of this case, because the jury did not pass upon the plea of former acquittal, and only rendered a verdict on the plea of not guilty. The defendant

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had a right to have a verdict on his plea of former acquittal; and in the absence thereof, it was erroneous to render judgment.—*Soliday v. Commonwealth*, 4 Casey, 13; 1 Bish. on Crim. Procedure, 578; *Nonnemaker v. State*, 34 Ala. 21. Reversed and remanded.

MONTGOMERY vs. THE STATE.

[INDICTMENT FOR LARCENY OF MULES.]

1. *Putting witnesses under rule; what is revisable.*—Where the witnesses for the prosecution, in a criminal case, are put under the rule, and one of them nevertheless remains in court during the examination of another, it is discretionary with the court to permit him to be examined; and the exercise of that discretion is not revisable on error.
2. *Conviction on testimony of accomplice.*—To authorize a conviction of felony on the testimony of an accomplice, (Penal Code, § 641,) it is not necessary that his testimony should be “corroborated by other evidence in every material part.”
3. *General verdict of guilty on good and bad counts.*—A general verdict of guilty, under an indictment containing both good and bad counts, will be referred to the good counts, and will support a judgment of conviction.

FROM the Circuit Court of Henry.

Tried before the Hon. H. D. CLAYTON.

THE indictment in this case, which was returned into court on the 23d April, 1867, contained two counts, each of which charged, that before the finding of the indictment, “to-wit, on the first day of January, 1867, George Montgomery feloniously took and carried away two mules, the personal property of Thomas J. Irwin”; the only difference between the two counts being, that the first averred the value of each mule to be more than one hundred dollars, while the second contained no averment of value. The trial was had at the same term, on issue joined on the plea

of not guilty, when the following bill of exceptions was reserved by the prisoner :

“On the trial, and before any of the witnesses had been sworn or examined, the defendant requested the court to put all the negro witnesses under the rule ; which was granted, and an order made to that effect. Four of the witnesses were thereupon called by the State, sworn, charged by the court, and sent beyond hearing. The trial then commenced. The first witness introduced by the State was Dr. Johnson, a joint owner of one of the stolen mules. When his direct examination was about half through, the State’s solicitor informed the court that one Brooks, a mulatto, was present in court, and was present when the above order was made, but was overlooked by mistake ; and as he would probably desire to use him as a witness, he requested the court to include said Brooks in the said order ; which was done, and said Brooks was sent out of hearing. It was in evidence, that said Brooks was jointly indicted with the defendant, and had appeared in open court, just before the commencement of this trial, confessed his guilt, and pleaded guilty to the charge, and his counsel invoked the mercy of the court in his behalf ; that said Brooks, during his arraignment and confession of guilt, appeared very penitent, and shed tears at the time the solicitor announced, in the hearing of the counsel for the defendant, that he expected to use Brooks as a witness on his trial ; that said Brooks was in court, and within the bar, when the first order was made, was not pointed out as a witness, was not excepted from the rule, and listened very attentively to Dr. Johnson’s testimony, which had reference to the loss of the stolen mules, their peculiar marks, the situation of the lot from which they were taken, the manner of the taking, their course from the lot, how he pursued them, &c. In the progress of the trial, the State offered said Brooks as a witness. The defendant objected to his introduction as a witness, because he was present in court when the order was made for the exclusion of the witnesses, was not pointed out as a witness, and was not excepted from the rule ; that he should not be allowed to testify, under the circumstances, because he was an accomplice and felon, and had heard

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the evidence of Dr. Johnson, and his testimony was of the utmost materiality to the prosecution ; there being no direct or positive testimony against the defendant, except that he was seen, in company with said Brooks, going in the direction and in the neighborhood of the lot from which the mules were stolen, on the night of the stealing ; and because said Brooks was jointly indicted with the defendant, and had pleaded guilty, and, under all the circumstances, was biased in favor of the State. The court overruled the objections, and allowed said Brooks to testify ; and the defendant excepted. The testimony of said Brooks was very material for the prosecution : he swore, among many other things, that the defendant went with him to the lot, and assisted him in stealing the mules as charged. The defendant asked the court to charge the jury, that said Brooks was an accomplice, and that a conviction could not be had upon his testimony, unless the same was corroborated by other evidence in every material part. The court refused to give this charge, but read to the jury section 641 of the Penal Code, as the law on that subject ; and the defendant excepted." The jury returned a verdict of guilty, and the court sentenced the defendant to imprisonment in the penitentiary for the term of two years.

W. C. OATES, for the prisoner.—1. It is admitted that, when the witnesses are put under the rule, and one of them returns of his own accord, or arrives after the others have been sent out, and hears a portion of the evidence, the court may, in its discretion, allow him to be examined ; and the reason of the rule is, that the party, being in no default, ought not to be prejudiced by an accident, or the fault of another. But neither the rule itself, nor the reason of it, extends to such a case as this, where the witness was in court all the time, and was not pointed out. The prisoner ought not to be prejudiced, nor the State benefited, by the default of the prosecuting attorney ; and the rule of exclusion ought to be strictly applied, where the proposed witness is an accomplice and infamous.—*The People v. Whipple*, 9 Cowen, 707 ; *Rex v. Webb*, 5 Car. & P. 91, cited in

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3 Stark. Ev. 1733 ; 4 Car. & P. 585 ; *Rex v. Calley*, 1 Moody & M. 329 ; 1 Greenl. Ev. § 880.

2. The charge asked ought to have been given. The peculiar facts of the case made it necessary and proper ; and as it was not inconsistent with the statute which the court read to the jury, it ought to have been given in the language in which it was asked—*Polly v. McCall*, 37 Ala. 21.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. When witnesses are placed under the rule, and one of them, by accident or design, remains within hearing of the testimony, it is altogether discretionary with the court whether or not he shall be examined.—*The State v. Brookshire*, 2 Ala. 303 ; *Grimes v. Martin*, 10 Iowa, 347 ; Roscoe's Crim. Ev. 127.

2. The charge asked by the defendant, required explanation and qualification, and was therefore properly refused. Penal Code, § 641 ; *Swallow v. The State*, 22 Ala. 20 ; *Godbold v. Blair & Co.*, 27 Ala. 592 ; *Partridge v. Forsyth*, 29 Ala. 200.

BYRD, J.—1. In allowing the witness Brooks to testify, under the facts and circumstances in evidence, the court committed no error. It was a matter of discretion, and, even if erroneous, is not revisable.—*The State v. Brookshire*, 2 Ala. 303 ; *Sidgreaves v. Myatt*, 22 Ala. 617 ; 1 Greenl. Ev. § 432 ; Starkie's Ev. §§ 199, 200 ; *McLean v. The State*, 16 Ala. 672. That he was competent, see Code, § 2302.

2. At common law, an accomplice was a competent witness against the other parties engaged with him in the commission of an offense. But the courts cautioned the jury against finding a prisoner guilty of a felony on such evidence ; though convictions have taken place thereon, and been sustained. In the progress of time, it seems that the judges instructed the juries, not to find a prisoner guilty of a felony, on the evidence of an accomplice, unless it was corroborated. But learned judges have differed as to the extent and character of such corroboration necessary to authorize a conviction. Some of the judges have held it sufficient, if the witness is confirmed in any material part of his evidence ; while others have required confirmatory

testimony as to the *corpus delicti*; and others, that there should be corroborating proof that the prisoner actually participated in the offense.

Under this contrariety of opinion, the legislature has adopted the following rule on the subject: "A conviction of felony can not be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient." Under this rule, the evidence of an accomplice is sufficient to authorize a conviction, if corroborated by other evidence tending to connect the defendant with the commission of the offense; and is not sufficient if only corroborated by evidence which shows the commission of the offense, or the circumstances thereof.

Neither all the evidence of the witness Brooks, nor all the evidence tending to connect the prisoner with the commission of the offense, is set out in the record. We can not, therefore, construe the charge asked by the evidence introduced on the trial. We must test its correctness by the statutory rule above set out.

The charge refused by the court, in putting the legality of a conviction upon a corroboration of "every material part" of the evidence of the witness Brooks, went beyond the requirements of the statutory rule, or any rule recognized by the common law; and the court therefore properly refused to give the charge.

3. A general verdict, on an indictment containing good and bad counts, is valid, for the verdict is referred to the good count.—*State v. Jones*, 5 Ala. 666; *State v. Lassley*, 7 Porter, 526; *State v. Briley*, 8 Porter, 472. The first count is clearly good; and no objection to the second count has been pointed out by counsel, nor has any occurred to us.—Penal Code, 211, No. 40.

The judgment is affirmed.

HARLEY vs. THE STATE, EX REL. ATTORNEY-GENERAL.

[INFORMATION FOR ESCHEAT OF ALIEN'S LANDS.]

1. *Alien's right to lands.*—An alien may purchase lands, and acquires by his purchase a defeasible estate, subject to be defeated by office found; and if he becomes a naturalized citizen before an information is filed for the forfeiture of the lands, his title becomes perfect, and cannot be divested by proceedings afterwards instituted.
2. *Naturalization; sufficiency of record and plea of.*—The record of the naturalization of an alien as a citizen is not required to show affirmatively the existence of all the legal pre-requisites; nor is it necessary that a plea of naturalization, in answer to an information, should show more than the judgment or record.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. FRANCIS BUGBEE.

THE information in this case was filed, on the 18th May, 1866, by John W. A. Sanford, as attorney-general, and alleged—1st, that on the 18th March, 1850, Alfred G. Knight and George F. Knight “were the purchasers in fee” of a certain lot in the city of Montgomery, which was particularly described in the information, “and were both unnaturalized aliens at the time they became such purchasers, and subsequent thereto”; 2d, “that afterwards, to-wit, on the 2d April, 1857, Andrew Harley became the purchaser in fee of the said lot or parcel of land, under the name of Andrew Harley & Co., and was, at the time of his said purchase, and subsequent thereto, an unnaturalized alien, and is in possession of the whole of said land, and claims the same in fee”; and, 3d, that the land was in the possession of Joseph Pizzala, as the tenant of said Harley. The information therefore prayed an inquest of office, and that the land might be declared forfeited to the State.

Harley filed a plea and answer to the information, in the following words: “Andrew Harley, by attorney, comes, and, for plea to said information, says, that the said infor-

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mation was filed by the attorney-general of his own mere motion, and without any instructions from any other department of the government. For further plea in this behalf, by leave of the court first had and obtained, he says, that Alfred G. and George F. Knight were not, at any time while they held said lands, unnaturalized aliens, nor was either of them; but that they were both duly naturalized as citizens of the United States, by the judgment of the circuit court of Montgomery county, Alabama, on the 29th day of November, 1848; and he denies that Joseph Pizzala is in possession of said premises, and avers that he is himself in possession of the same, and that Joseph Pizzala merely occupies the premises as his tenant up to the 1st October next; and he alleges that he has been in possession of the same ever since the 2d day of April, 1857, at which time they were conveyed to him, while he was an unnaturalized alien; but he denies that he is now an unnaturalized alien, and avers that he was duly naturalized a citizen of the United States, on the 1st November, 1860, by the judgment of the circuit court of Cook county, Illinois, in the 7th judicial circuit of said State; and he also avers that, before the 2d day of April, 1857, he had duly filed his declaration of intention to become a citizen of the United States; all of which he is ready to verify. And for further plea in this behalf, by leave of the court first had and obtained, he says, that the premises which are described in the information are the same mentioned and conveyed in a certain deed from Lewis J. Cahn and wife to Elizabeth Pizzala, referred to in an act of the legislature of the State of Alabama for the relief of Elizabeth (*alias*) Eliza Pizzala, approved February 20th, 1866."

This plea was interposed "in short by consent," and a demurrer to it was filed in like manner, an assignment of the grounds of demurrer being waived. The court sustained the demurrer, and, the defendant declining to plead over, rendered judgment for the State, declaring the land forfeited, and the title vested in the State.

The errors now assigned are—1st, the sustaining of the demurrer to the plea; 2d, not visiting the demurrer to the plea back on the information; 3d, not rendering judgment

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on the demurrer in favor of the defendant; and, 4th, the final judgment.

RICE, SEMPLE & GOLDTHWAITE, for appellant.—1. Naturalization “cancels all defects” in the capacity of an alien to take, hold, and transmit real estate, “and is allowed to have a retrospective energy.”—2 Black. Com. 250; *Gouverneur’s Heirs v. Robertson*, 11 Wheaton, 332, 350. If an alien purchaser and grantee of real estate “be naturalized before office found, his title becomes valid by relation, and it cannot be thereafter divested.”—*White v. White*, 2 Metc. (Kentucky,) Rep. 189; *Jackson v. Beach*, 1 Johns. Cases, 399. The alienage of the purchaser is a cause of forfeiture to the State, which can be established only in a judicial proceeding instituted for that purpose.—*Wright v. Sadler*, 20 New York Rep. 324. No such judicial proceeding, which is instituted after the naturalization of the alien, can be maintained.

2. Alienage is attended with two classes of disabilities: 1st, an alien is disabled from defending an inquest of office, as to lands which he has lawfully acquired by purchase; 2d, he is disabled from taking any thing by descent—that is, by mere act of law. In England, the retrospective energy of an act of naturalization by parliament may be “such that it relates back to the period of the birth of the party; and consequently, where an alien wife thus is naturalized, she is thereby rendered dowable of all lands of which her husband was seized during the coverture, including those conveyed by him before her incapacity was removed.”—Scribner on Dower, 145, 181. In other words, such naturalization in England may, by its retrospective operation, divest even rights which had vested in others. It removed both the aforementioned classes of disabilities, and related back to the birth of the party. Naturalization in the United States, according to some of the decisions, operates retrospectively only as to the disabilities in the first class above numbered.—*Priest v. Cummings*, 20 Wend. R. 338, and other cases cited for appellee. But it is well settled, that naturalization in the United States operates retrospectively, to free the party from the disability he was

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under by alienage, to defend himself against an inquest of office begun after naturalization.—*Priest v. Cummings*, *supra* ; Scribner on Dower, 177.

3. The act of the legislature is clearly inoperative, as to the title which had become perfect in the alien purchaser, by his naturalization prior to the passage of that act.

4. The proceeding instituted in the court below is not authorized by any law, and cannot be sustained.

ELMORE, KEYES & MORRISSETT, *contra*.—1. An alien may purchase real property in this State, and may hold it until office found. The rule has descended to us as a part of the ancient common law, and the reason of it is now but little more than a subject of inquiry for the antiquarian or the legislator.—1 Bac. Abr., tit. *Aliens*, 201; *Jenkins v. Noel*, 3 Stewart, 60; *Smith v. Zaner*, 4 Ala. 99; *Etheridge v. Malempre*, 18 Ala. 565.

2. The naturalization of an alien takes effect from the time of his being naturalized, or it relates back to the time he was *in ventre sa mere*. There can be no middle point. There is nothing in the common law, nor in the acts of congress, nor elsewhere, that justifies the position, that naturalization in this country relates back to the filing of the declaration to become a citizen; such declaration of intention is a mere condition precedent, prescribed by act of congress. The first section of the act of 1802 is conclusive. It declares, "that any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise": 1st, that he shall have declared, three years before his admission, that it was his intention to become a citizen; 2d, at the time of his application to be admitted to citizenship, and not before, he must declare, on oath or affirmation, that he will support the constitution of the United States, and then, and not until then, is he required, or does he renounce allegiance to his former government; 3d, follows a judicial investigation (*In re Clark*, 18 Barb. 444,) into the residence of the applicant, his conduct, &c., and then there is the judgment of the court, admitting him to citizenship from and after that date.—See Brightley's Di-

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gest, 33. It is well settled, that a person never loses one domicile until he gains another. No one has ever heard of domiciliary rights having relation back beyond the time the new domicile was acquired.

3. The *onus* of showing that such relation back exists, in this country, in cases of naturalization, rests upon those who assert its existence. In England, there are two ways in which an alien could become capable of holding lands against the crown. One was by letters of denization from the king, and the other was by act of parliament specially naturalizing the applicant.—Bac. Abr. 198(*B*). Denization does not operate retrospectively, (2 Black. Com. 249;) nor does an act of naturalization, unless it has a retrospective energy.—See *Fish v. Klein*, 2 Meriv. 431. In all such cases, it is a question merely of statutory construction. In *Vaux v. Nesbit*, (1 McCord Chan. Rep. 378,) Chancellor DeSausure, in speaking of *Fish v. Klein*, says: “In the report of this case by Mr. Merivale, he states, that the vendor had been desirous of having retrospective words introduced into the naturalization act, which was refused, because parliament would not depart from the common form. And the words of our statutes for naturalizing aliens are evidently prospective, and do not furnish so strong a ground for retrospective operation as the words of the British act which we have just cited, and which were denied to have a retrospective force.”

Scribner says, the rule may be considered settled in this country, that naturalization does not have a retrospective effect; and he recites divers authorities in support of the position.—1 Scribner on Dower, 176–82. See, also, Cruise’s Digest, (Greenleaf’s ed.,) where it is also said, that naturalization does not relate back. “If the alien should undertake to sell to a citizen, yet the prerogative right of forfeiture is not barred by the alienation, and it must be taken to be subject to the right of the government to seize the land.”—2 Kent’s Com. 61. It is the purchase by the alien which gives to the State the right to have inquest of office. The subsequent naturalization cannot, any more than alienation to a citizen, divest the right of the State to a forfeiture. The only question in either case is, the alienage at the time of the purchase.

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4. The objection to the form of the information is not well taken. No particular form is necessary ; a statement of the facts, which shows the forfeiture of a specified parcel of land, and which is so made that issue can be taken on the merits, is sufficient. Besides, an objection to the form is too late, after a plea to the merits. Any citizen may proceed in such case, in the name, and for the benefit of the State. It has always been the practice in this State for the attorney-general to proceed *ex mero motu* in informations, and the practice in those cases which are reported certainly justifies the practice in this case.—See *The State ex rel. Attorney-General v. Williams*, 1 Ala. 342 ; *The State ex rel. Attorney-General v. Porter*, 1 Ala. 688 ; *Paul's case*, 5 Stew. & Por. 40 ; also, *Macauley v. The State*, 31 Maryland. Besides, the fact that a citizen is a relator as attorney-general, cannot affect his right as a citizen to be a relator. The most, then, that can be held, is, that the words "as attorney-general" are surplusage.

5. It is said that the State cannot have an inquest of office, because, before the filing of the information, the right of the State had been vested by an act of the legislature, (Acts 1865-6, p. 572,) in Elizabeth Pizzala. But the act of the legislature would be nugatory, unless this proceeding in the name of the State could be had to divest the title of Harley. Statutes are never construed so as to render them nugatory, when another construction will give them effect. The grant of anything is also the grant of the means necessary to obtain possession and enjoyment of it. *Cuicumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit*.—Broom's Legal Maxims, 198. At common law, the assignor of a right not assignable gave to the assignee the right to use the name of the assignor in a suit at law. The act of 1865-6, above cited, operated as an abrogation, *quoad hoc*, of any and every rule of law, which might otherwise have presented an obstacle to this proceeding. But we know of no rule of law which prevented the proceeding in the name of the State.

The State cannot bring ejectment against an alien to recover real estate purchased by the alien. The title to the land vests in the State on an inquisition, by the judgment

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of the court, and the right of possession follows this judgment. If Elizabeth Pizzala had sued to recover this real estate, upon *what title* could she have relied? Only upon that which she acquired by the provisions of the act of 1865; and she could acquire no other right or title than the State had. She could not, in her own name, and for her own benefit, institute an inquisition to ascertain to whom the allegiance of the alien was due. That could only be done by the State. She could not sue in ejectment, because the State could not. Again, Harley was holding adversely against the world at the time the act was passed; and this act has no greater effect than a contract or conveyance; and it is well settled that, when A is in possession claiming property as his own, the real owner cannot convey to another person so as to enable him to sue and recover in his own name. He must use the name of the real owner; and when recovered in that name, the recovery enures to the benefit of the grantee, by virtue of the conveyance to him from the real owner.

JUDGE, J.—Under the demurrer interposed in the court below, the following allegations of one of the pleas are to be taken as true: 1st, that Harley purchased the lands described in the information, on the 2d day of April, 1857, and that there was a conveyance to him of the title on that day; 2d, that, at the time of the said conveyance, Harley was an unnaturalized alien, but that previously thereto he had filed his declaration of intention to become a citizen of the United States, and was duly admitted to such citizenship on the 1st of November, 1860, by the judgment of the circuit court of Cook county, in the State of Illinois. These allegations present the merits of the main question involved, which we proceed to consider.

An alien may acquire lands by purchase, but not by descent; and there is no distinction, whether the purchase be by grant or by devise; in either event, the estate vests in the alien as a defeasible estate, subject to escheat at the suit of the government. He has complete dominion over the estate of which he is thus seized, until office found; may hold it against every one, even against the govern-

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ment, and may convey it to a purchaser—that is to say, may convey a defeasible estate only, subject to be divested on office found. The ancient rule of the common law was, that an alien could not maintain a real action for the recovery of lands, but he might, in such action, defend his title against all persons but the sovereign. It has been held, however, in North Carolina, if not in other States of the Union, that he may maintain ejectment. The common law was, also, that the king could not grant lands forfeited by alienage, until he was in possession by office found; but, when the alien died, the sovereign was seized without office found, because, otherwise, the freehold would be in abeyance, as the alien could have no inheritable blood.

As to grants for the cause of alienage, by State legislation, without an inquest of office, Judge Story has said, "That an inquest of office should be made in cases of alienage, is a useful and important restraint upon public proceedings. It protects individuals from being harassed by numerous suits, introduced by litigious grantees. It enables the owner to contest the question of alienage directly, by a traverse of the office. It affords an opportunity for the public to know the nature, the value, and the extent, of its acquisitions *pro defectu hæredis*. And, above all, it operates as a salutary suppression of that corrupt influence which the avarice of speculation might otherwise urge upon the legislature. The common law, therefore, ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose."—*Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603. But each State has the undoubted right to enact laws regulating the descent of, and succession to, property within its limits, and consequently to permit inheritance by or from an alien.

We refer to the following authorities, as sustaining the propositions of law hereinbefore announced: 2 Kent, 62–64; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603; *Orr v. Hodgson*, 4 Wheaton, 453; *Gouverneur's Heirs v. Robertson*, 11 Wheaton, 332; *Scanlan v. Wright*, 13 Pick. 532; *Montgomery v. Dorian*, 7 New Hamp. 475; *People v. Folsom*, 5 Cal. 373; *Rouche v. Williamson*, 3 Iredell, 141;

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Waugh v. Riley, 8 Metcalf, (Mass.) 290 ; *Wilbur v. Tobey*, 16 Pick. 177 ; *Etheridge v. Malempre*, 18 Ala. 565.

When Harley purchased the land in controversy, and during the period of his alienage thereafter, he was seized of a defeasible estate in the premises, accompanied with all the incidents of ownership of such an estate. During the same period, the only right which the State could have in the premises was the right to have the land escheated, by a judicial proceeding in the nature of an inquest of office. This prerogative right of sovereignty was not asserted during the period of Harley's alienage ; but he was permitted to retain his estate, without molestation, until he had been admitted to full citizenship. This result effected an extinguishment of the right of the State to escheat the land, if such right existed, and perfected the title of Harley. As Sir Matthew Hale has said, "The law is very gentle in the construction of the disability of alienism, and rather contracts than extends its severity."—2 Kent, 56–62. See, also, *Jackson v. Beach*, 1 Johnson's Cases, 399 ; *White v. White*, 2 Met. (Ky.) 189.

Foreigners are admitted to the rights of citizenship, with us, on liberal terms ; and the public policy of the United States, in regard to their becoming citizens, as shown by the naturalization laws of the government, is certainly in harmony with the main conclusion attained in the present case.—2 Kent's Com. 56.

2. It was contended in the argument, that the plea of naturalization is defective, in not averring compliance with the pre-requisites expressly made by the law conditions precedent to the admission to citizenship. It has been held, that it is not necessary that the record of naturalization should show that all the legal pre-requisites had been complied with, the judgment being conclusive of such compliance.—*Starke v. Chesapeake Ins. Co.*, 7 Cranch, 420 ; *Ritchie v. Putnam*, 13 Wendell, 524 ; *Spratt v. Spratt*, 4 Pet. 406. It follows, that it is not necessary to do more in the plea, than aver the rendition of the judgment.

Judgment reversed, and cause remanded.

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[INDICTMENT FOR MURDER.]

1. *Murder ; sufficiency of verdict.*—Under an indictment for murder, a judgment of conviction cannot be rendered on a verdict of guilty which does not find the degree of the crime.
2. *Personal presence of prisoner in court during preliminary proceedings.* In a case of felony, it is the safer and better practice to have the prisoner personally present in court, when the order is made setting a day for his trial, and prescribing the number of jurors to be summoned.
3. *Non-residence of persons summoned as jurors, good cause of challenge, but no objection to venire.*—The fact that some of the persons specially summoned as jurors in a capital case are not residents of the county, constitutes a good cause of challenge by either party, (Penal Code, § 628,) but does not give the prisoner a right to have the whole venire set aside.
4. *Admissibility of defendant's conduct and declarations as evidence.*—The conduct and declarations of the prisoner, shortly after the commission of the homicide with which he is charged, while they may be competent evidence against him, are not admissible evidence in his favor.
5. *To what witness may testify.*—The supposition of a witness, as to the whereabouts of another person at a particular time, is not competent evidence.
6. *Cross-examination of witness.*—On the cross-examination of a witness, for the purpose of testing his correctness, fairness, or credibility, much must be left to the enlightened discretion of the presiding judge.
7. *Relevancy of evidence showing probable cause for homicide.*—Where a man is indicted for the murder of his wife, proof of a criminal intimacy between him and another woman, at the time of the commission of the offense, is admissible against him.
8. *Examination of witness as to matters tending to criminate or degrade him.*—A witness is not bound to answer questions as to matters which may criminate him; but this rule does not extend to matters which only tend to degrade or bring shame on him.
9. *Charge as to constituents of murder.*—A charge, instructing the jury that, "if the deceased was found dead in her bed, with her throat cut, they would be authorized to find the existence of all the legal requisites of murder in the first degree," is erroneous, because it excludes from their consideration the questions, whether the death was the result of suicide, and whether it resulted from a conflict which would reduce the degree of the homicide.

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10. *Weight of circumstantial evidence.*—Where circumstantial evidence is such as to produce in the minds of the jury, beyond a reasonable doubt, a conviction of the defendant's guilt, it is as much their duty to find a verdict of guilty, as if the evidence were positive and direct.
11. *Proof of prisoner's good character ; effect of.*—As to the consideration to be given to proof of the prisoner's previous good character, in a criminal case, the correct rule is laid down in the case of *Felix v. The State*, 18 Ala. 720; that is, that such evidence is admissible and competent, not only where a doubt exists on the other proof in the case, but even to generate a doubt as to his guilt.
12. *Charge on circumstantial evidence.*—A charge to the jury, in these words: "If there is evidence tending to show that the prisoner is guilty of the offense charged in the indictment, and an absence of proof or suspicion of any other guilty agent, the absence of such proof is a circumstance to be considered by the jury as evidence against him,"—is not erroneous.

FROM the Circuit Court of Cherokee.

Tried before the Hon. WM. J. HARALSON.

THE prisoner in this case, William Hall, was indicted at the November term, 1865, for the murder of his wife, Mrs. Margaret Hall; and was tried, on issue joined on the plea of not guilty, at the May term, 1867. On the 30th April, 1867, as a minute-entry in the record shows, a day was set for the trial, and the sheriff was ordered to summon a special *venire* for the trial; and it was further ordered, "that a copy of the indictment, as well as a list of the jury, be served on the defendant, at least one entire day before the trial"; but the record does not show that the defendant was personally present in court when this order was made.

"On the trial," as the bill of exceptions states, "the State being announced ready for trial, the defendant objected to being put on his trial, because the list of jurors served on his counsel did not contain the number of resident citizens of the county required by law and the order of the court, and moved the court to quash the *venire* for that reason; and, in support of his objection and motion, made proof to the court, that three of the persons named in the *venire* and summoned, to-wit, Josiah Brock, Edmund Coffee, and J. L. Cunningham, were at the time of the trial, and at the time they were summoned as jurors in

this case, residents of the county of Baine. The court overruled the objection, and the defendant excepted. The solicitor for the State proposed, that, with the defendant's consent, the names of said three jurors should be withdrawn, and that the sheriff should summon, in their stead, three other jurors, residents of Cherokee county; which offer was not accepted by the defendant." During the organization of the jury, the names of said Cunningham and Brock were drawn as jurors; but, it being shown that they were non-residents of the county, they were challenged for cause by the State, and were excluded; to which the defendant excepted.

"George Cahoon, a witness for the State, was then examined, who testified, among other things, that on a certain night, about nine o'clock as he supposed, after he had gone to sleep, at his mother's house, from seventy to ninety yards from the defendant's residence, he was wakened by the defendant, who called him up; that he got up, and went out, and found the defendant about ten steps from the house; that the defendant told him his wife was dead—that he had gone out to watch his melon patch, and was gone about an hour and a half, and found his wife, when he came back, dead in bed, with her throat cut; that the defendant seemed to be crying; that he (witness) went with defendant to his house, and found his wife lying in bed, dead, and with her throat cut; that he went, at the defendant's request, for the defendant's sister, who was living with the defendant, but was absent that night about a mile or more from the house; and that he returned with her about an hour and a half afterwards. The defendant then offered to prove, on cross-examination of said witness, his conduct and statements when he met his sister, on the return of said witness with her. On objection by the State, the court refused to allow the proof to be made, and the defendant excepted. Said witness testified, also, that, at the defendant's request, some negro houses near by were searched, with a view to discover the murderer; that, on said search, two negro men, Herod and Isaac by name, who did not live there, were found at said cabins, besides the families living there; that Herod seemed alarmed, and

asked what was the matter, but was told nothing, and that Herod left the neighborhood immediately afterwards. On re-examination by the State, in answer to the question, where is Herod, said witness answered, that he was at the iron-works; and on question by the defendant's counsel, as to how he knew it, he said that he supposed he was there; to which the defendant objected, and excepted to the overruling of his objection.

"On cross-examination of a witness for the State, who said that he was about the defendant's house a good deal, the defendant proved, that his character was that of a kind and affectionate husband to his wife, and that he always treated his wife kindly; and said witness testified, on re-examination by the State, that the defendant's kindness to his wife was just like that of other husbands in the neighborhood. The defendant then asked said witness, if he knew of any other husband in the neighborhood who milked the cows for his wife. The court sustained an objection to this question, and the defendant excepted.

"In rebuttal of the evidence of good character introduced by the defendant, the State offered to prove acts of intimacy between him and one Mary Taylor, a widow woman; to which the defendant objected, but the court overruled the objection. The witness testified, that he saw the defendant and said Mary Taylor, three or four weeks before the death of the defendant's wife, walking together, with their arms around each other, and going towards a field where they were raising a crop, to get horses, as he supposed, to go to plowing; and that they separated on seeing him. Defendant excepted. Other acts of intimacy were proved; to the introduction of which, each and all, the defendant objected and excepted.

"Mary Taylor, a witness for the State, was asked by the solicitor, if at any time, during the year 1865, the defendant made any professions of love, affection, or attachment to her, at what time, and what they were; to which question the defendant objected, and reserved an exception to the overruling of his objection. The witness answered, that directly after she moved there, to a house from seventy to ninety yards from the defendant's, she can not tell what

he said. The prosecuting attorney then told her, if she could not give his language, to give the substance of what he said. In answer to this, and repeated questions by the prosecuting attorney, the witness answered, 'He was always talking about me, what a good-looking woman I was; and said he thought more of me than any person in the world.' To each of these questions and answers the defendant objected; which objections were overruled by the court, and the defendant excepted.

"When said witness was turned over for cross-examination, she was instructed by the court, at her own instance, that she was not bound to answer any question that would criminate or put her to shame; to which instructions the defendant objected and excepted. Said witness was asked, in relation to her answer to direct examination, what it was that her mother and brother had said to her; to which she answered, 'They did not say anything, only the fix I was in by him.' Being then asked, what was that fix, the court told her, under the former instructions, that she could answer the question or not as she pleased; and the witness answered, that she did not wish to state; to which the defendant objected and excepted. .

"The State introduced evidence tending to show, that said Mary Taylor was pregnant by the defendant at the death of his wife, and that they were much attached to each other; that her mother and brother were offended with her, and threatened that she must leave home on account of her situation; that the defendant had promised to take her and leave the county in the fall; that, on the morning before the killing of the deceased, she told the defendant of the dissatisfaction of her mother and brother with her, and that the defendant then promised, if something did not happen that he got *shot* of his wife, he would take her and leave the county in the fall; that she told him 'nothing could happen, unless murder, or something of that sort'; and that he replied, 'she did not know what could take place'.

"The court charged the jury, in writing, as follows: 'The defendant is indicted for the murder of his wife. By our statute, murder is defined as follows,' quoting section 3080

of the Code. 'If, however, in this case, you find from the evidence that the deceased was found in her bed, in her own house, with her throat cut, and another wound inflicted on her person, you would be authorized to find that all of the necessary and legal requisites which are required to constitute the crime of murder exist, and that the perpetrator would be guilty of murder in the first degree. Your first inquiry, then, will be directed, under the testimony, to the question whether the defendant is guilty as charged in the indictment. The law presumes every man innocent; but that presumption may be overcome by proof; and that proof may be made, and that presumption overcome, either by positive and direct, or by circumstantial testimony. You are as much authorized, under the law, to convict or acquit upon circumstantial, as upon direct or positive testimony, the circumstances being satisfactory to you. A well connected chain of circumstances may be as fully and as completely satisfactory of the truth or falsity of any given proposition, as positive or direct testimony. In reconciling any seeming conflict which you may meet in this investigation, it is your duty to make all of the witnesses speak the truth, if you can. If, however, you can not reconcile it, you will then look to the interest, connection, and feeling of relationship on the one hand, and malice on the other, or bias, or the manner or demeanor of the witness who testifies before you; and to accredit or discredit such witness or witnesses, as you may deem worthy or unworthy of credit. The credibility of a witness may be attacked by contradicting him upon proper predicates laid, and such attack may be successful or not, in proportion to the number and credibility of the witnesses introduced for such purpose. But witnesses so attacked may sustain, and even strengthen their credibility, by the introduction of witnesses to character, just in proportion to the number and credibility of such witnesses, to be by you determined under the rules of evidence given you by the court. The burden of proof is cast upon the State; that is, the State must fully satisfy the jury, beyond a reasonable doubt, of the guilt of the defendant, as charged in the bill of indictment. The declarations of a party, when given in evidence, are all to be

taken together, and so considered by the jury, and be received or rejected as the jury may believe or disbelieve any of the statements. You may, finally, examine, weigh, and compare all the testimony in this case, calmly, carefully, and solemnly, in view of its vast importance as well to the State as to the defendant at the bar. If, from such examination, you are satisfied, beyond a reasonable doubt, (which doubt must arise from the testimony, and not from any feeling or bias outside thereof,) of the guilt of defendant as charged, you will so find in your verdict. The defendant, however, puts his good character in issue, and insists that it is good. This he has a right to do. It is with you to say, from the testimony, whether such character is good or not, and give the defendant the benefit of it, as hereinafter charged. Character is no excuse, when the crime is fully proved; but, if you have a doubt, under the rule laid down, before and after a careful examination of all the facts, the good character found may be considered, as matter of defense, to decide or to generate a doubt in the minds of the jury, for the benefit of the defendant. If, from the testimony, you find the defendant guilty as charged, you will say by your verdict whether he shall suffer death or imprisonment in the penitentiary for life. If, however, you find from the testimony that the defendant is not guilty, you will by your verdict say, 'We, the jury, find the defendant not guilty.' In either event, when decided, return your verdict into court."

"The court charged the jury, at the instance of the counsel for the State, that if there was evidence tending to show that the defendant was guilty of the offense charged, and an absence of proof or suspicion of any other guilty agent, the absence of such proof was a circumstance to be considered by the jury as evidence against the defendant.

"The defendant excepted to the first charge given by the court at the request of the State," and then requested several written charges, all of which the court gave except the fourth, which was as follows: "4. A conviction of felony can not be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such cor-

roborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient." The defendant excepted to the refusal of this charge.

The jury returned a verdict of guilty, but did not specify the degree of the offense, and sentenced the defendant to imprisonment in the penitentiary for life.

M. J. TURNLEY, THOS. B. COOPER, J. B. WALDEN, and RICE, SEMPLE & GOLDTHWAITE, for the prisoner.

JOHN W. A. SANFORD, Attorney-General, *contra*.

A. J. WALKER, C. J.—1. The verdict in this case was defective, and could not be the legal predicate of a sentence, because it does not specify the degree of murder of which the accused was guilty.—*Johnson v. State*, 17 Ala. 618; *Cobia v. State*, 16 Ala. 781. For the error of rendering judgment on the insufficient verdict, there must be a reversal; and we shall proceed to announce our opinion as to the material questions of law presented by the bill of exceptions, for the guidance of the court on another trial.

2. Without deciding that the personal presence of the prisoner, when a day was set for trial, and the number of jurors prescribed, was indispensable, we express the opinion, that it is the safer and better course to have the prisoner in court when such orders are made, and that the record should so affirm.—1 Bishop on Criminal Procedure, §§ 682-6; *Henry v. State*, 33 Ala. 389.

3. If the accused was in actual confinement, the law requires that a copy of the indictment, and a list of the jurors, should be delivered to him, at least one entire day before the day appointed for the trial.—Penal Code, § 619. That any of the jurors were incompetent, because they were not residents of the county, was a legal cause of challenge by either party; but we do not think that the summoning, through inadvertence, of those non-residents of the county, gave to the defendant a right to demand of the court, beyond the control of its discretion, that the entire list should be set aside.—*Bill v. The State*, 29 Ala. 34, and authorities cited in the opinion; Penal Code, § 628; *McCarty v. The State*, 26 Miss. 299.

4. The court committed no error in refusing to permit the prisoner to prove his conduct and statements upon the occasion of his meeting his sister, on her arrival with the messenger who had been sent for her. We declare the inadmissibility of such evidence, on the ground stated in *Campbell v. State*, 23 Ala. 44, 79. See, also, *Johnson v. State*, 17 Ala. 618.

5. The *supposition* of the witness, that the negro Herod was at work at the iron-works, was not evidence.

6. The question of the prisoner, as to husbands in the neighborhood milking cows for their wives, was altogether irrelevant to the issue. It would only be admissible in cross-examination, for the purpose of testing the correctness, fairness, and credibility of the witness; and we think that the extent to which such questions should be allowed, for such a purpose, must be left to the enlightened discretion of the presiding judge.—1 Greenleaf's Ev. § 449.

7-8. It was permissible for the State to prove an improper intimacy between the defendant and a woman other than his wife.—*Johnson v. State*, 17 Ala. 618; *State v. Watkins*, 9 Conn. 47; Wharton's Amer. Crim. Law, § 639. Upon the cross-examination of the witness by whom this proof was made, the accused was not legally restricted from propounding questions which tended to degrade or bring shame on the witness. The restriction of the rule relates to questions, the answers to which may criminate the witness.—1 Greenleaf on Ev. § 454.

9. The court charged the jury, in effect, that if they found, from the evidence, that the deceased was found in her bed, in her own house, with her throat cut, and another wound inflicted on her person, they would be *authorized* to find all the requisites of the crime of murder in the first degree. This charge was erroneous, because it excluded from the jury the consideration of the questions, whether the death was the result of suicide, and whether it had not resulted from a conflict which would reduce the crime to a lower grade than murder in the first degree.

10. We think the charge as to the effect of circumstantial evidence was correct. If circumstantial evidence is such as to produce a conviction of guilt upon the juror's

mind, beyond a reasonable doubt, it is as much his duty to find a verdict of guilty; as if the evidence had been positive and direct.

11. The benefit of a good character to a defendant is not restricted to cases where a doubt of the defendant's guilt may exist. The correct rule, as to the consideration to be given to the good character of the accused in a criminal case, is laid down in *Felix v. State*, 18 Ala. 720. See, also, *Rosenbaum v. State*, 33 Ala. 354.

12. We do not think there was any error in the charge, that the absence of "proof" of any other guilty agent, was a circumstance to be considered by the jury, as evidence "against the defendant." We think that the phraseology selected by the court puts the point in a strong light against the defendant. The word "proof" is sometimes used in a sense, which, if accepted by the jury as having been intended by the court, might have misled them to the prejudice of the defendant. The better word, we think, would have been "evidence." Peradventure, there might have been evidence of some other guilty agent, strong enough to generate a doubt of the defendant's guilt, and yet not strong enough to amount to "proof", when used in the sense of evidence of that degree which convinces the mind of the certainty of a fact. Proof, however, is often used as the synonym of evidence. The charge was, therefore, only objectionable for its tendency to mislead; and it was for the defendant to request an explanation, which would no doubt have been cheerfully given.

When a homicide has been committed, and the circumstances tend to show that the accused was the perpetrator, then the absence of evidence of any other guilty agent is a circumstance which may be weighed and considered as evidence against the accused, upon the question, *whether he committed the homicide*. This is what we understand was intended to be asserted by the charge, and what was most probably understood to have been asserted by it. The charge, being given in the hurry of the occasion, omits to designate in terms the question upon which the absence of testimony as to the guilt of some other person would be evidence against the accused. In that particular, it might be im-

proved in clearness and precision, and more satisfactorily freed from liability to mislead the jury. There are questions in the case upon which the absence of such testimony would not be evidence against the defendant. For example, it was incumbent upon the jury to ascertain how the death of the decedent was caused ; whether by violence inflicted by her own hand, or by the hands of another ; and also to ascertain, if they found the accused to be the perpetrator, in what degree he was guilty.—Wills on Cir. Ev. pp. 202–7; 1 Greenleaf on Ev. p. 18, § 13a; Starkie on Ev. part 3, § 77. The weight of the absence of such evidence is increased, by the probability that, if any other person had perpetrated the deed, there would have been discoverable traces of it. “In a criminal case, where all the circumstances of time, place, motive, means, opportunity, and conduct, concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of another agent, although, had any other existed, he must have been connected with the perpetration of the crime by motive, means, and opportunity, and by circumstances necessarily accompanying such acts which usually leave manifest traces behind them.”—Starkie on Evidence, part 3, § 71.

It is not clear that the bill of exceptions shows, with sufficient certainty, that the charges in writing given by the court were excepted to. Without consideration of that question, we have presented our view of the law applicable, so far as we deemed necessary for the guidance of the court on another trial.

As all the evidence is not before us, we are not able to decide certainly whether the charge asked, as to a conviction on the testimony of an accomplice, was abstract, and properly refused on that ground. It but enunciates the law, as laid down in section 641 of the Penal Code, and should have been given, if not abstract.

The judgment of the court below is reversed, and the cause remanded ; but the prisoner must remain in custody until discharged by due course of law.

GRUND *vs.* THE STATE.

[SCIRE FACIAS AGAINST BAIL ON FORFEITED RECOGNIZANCE.]

1. *Sufficiency of sci. fa.*—In proceedings on a forfeited recognizance, it is not necessary that the notice, or *scire facias*, should be in exact or literal conformity with the form given in section 704 of the Penal Code ; and the fact that it is directed to “any sheriff of the State”, commanding him to notify the defendants, instead of being directed to the defendants themselves, does not render it invalid or insufficient.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. JAMES COBBS.

THE judgment *nisi*, the *scire facias*, and the judgment final, as set out in the record in this case, are in the following words :

“ The State of Alabama	} It appearing to the
<i>vs.</i>	
James Stephens, and John Grund.	satisfaction of the

court, that James Stephens and John Grund agreed to pay the State of Alabama the sum of two hundred dollars, unless the said James Stephens appeared here at this term of the court, to answer to the State of Alabama the offense of assault and battery, whereof he stands indicted in said court ; and the said James Stephens, being solemnly called to come into court and answer as aforesaid, came not, but wholly made default : It is therefore ordered by the court, that the State of Alabama, for the use of Marengo county, recover of said defendants, James Stephens and John Grund, the said sum of two hundred dollars, for their default aforesaid, on such undertaking, unless they appear here at the next term of this court, and show cause why this judgment should not be made absolute against them.”

“The State of Alabama,	} To any sheriff of the State
Marengo county.	

of Alabama, Greeting: Whereas, at a circuit court for the State of Alabama, begun and held for the county of Marengo, at the court-house in Lin-

den, on the third Monday in March, A. D. 1866, the following judgment was rendered against James Stephens", setting out the judgment *nisi*: "Therefore, you are hereby commanded to make known unto the said James Stephens and John Grund, to appear here at the next term of this court, and show cause, if they can, why the judgment aforesaid shall not be made absolute against them. Herein fail not", &c.

"The State of Alabama

vs.

James Stephens and Jno. Grund.

} This day came Thos.
W. Coleman, solicitor
for the State of Ala-

bama, and also came John Grund, one of the defendants, by his attorneys; and it appearing to the satisfaction of the court that, at the spring term last, A. D. 1866, of this court, a judgment *nisi* was rendered against said defendants in this cause, for the sum of two hundred dollars; and it further appearing to the court that, since the rendition of said judgment *nisi*, at least two writs of *scire facias* have been duly issued, and returned by the sheriff of said county respectively, 'not found' as to James Stephens; and the said defendant John Grund, by his counsel, now here files his demurrer to the *scire facias*, which demurrer, being argued by the counsel for the plaintiff and defendant, and considered by the court, was overruled; and said defendant John Grund declining further to plead: It is therefore considered and ordered by the court, that the State of Alabama, for the use of Marengo county, recover of said defendants, James Stephens and John Grund, the said sum of two hundred dollars, amount of judgment *nisi* aforesaid, and also costs of suit."

The following were the causes of demurrer assigned by the defendant Grund: "1st, that the pretended *scire facias* is not such a notice as is required by law; 2d, that the notice of the conditional judgment is not such a notice as is required by law, because it does not appear that any indictment was in said court against said Stephens; 3d, that the said notice is not such as is by law required to be given to the defendant, because it is directed to any sheriff of the State, and not to the defendants; 4th, that no notice, in manner and form as by law required, has been given to the

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defendants ; and, 5th, that the alleged *scire facias* is insufficient in law."

The appeal is sued out by the defendant Grund, who assigns as error the overruling of his demurrer to the *scire facias*, together with the judgments *nisi* and final.

McCAA & FOSTER, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*,

BYRD, J.—Grund has alone assigned errors, and we will confine our investigation to the assignments made and argued by counsel. The judgments *nisi* and final, and the notice served upon appellant, are in substantial conformity to sections 703, 704, and 707 of the Code ; and a substantial conformity thereto is all that is required by the Code. The counsel for appellant insist, that the word "may", in sections 703 and 704, must be construed as imperative. If so, still those sections are not to be construed as requiring an exact or literal conformity to the forms therein set forth. The mere address of the notice to the sheriff, instead of to the defendants, is not such a departure from the spirit and substance of the law as to vitiate the notice, or render it invalid, if it otherwise substantially fulfills the requirements of the law. The court properly overruled the demurrer of appellant, and we perceive no error in the record reached by the assignments made by him.

The case of *Emanuel v. Ketchum*, (21 Ala. 257,) is not in conflict with the views above expressed. The undertaking, or bail-bond, is sufficiently set out in the judgment *nisi*, to meet the requisitions of the Penal Code, and the rule laid down in the case of *Emanuel v. Ketchum* ; and the *sci. fa.* sets out a substantial copy of that judgment, and the judgment absolute follows the *sci. fa.* and section 707 of the Code.—*Richardson v. The State*, 31 Ala. 347 ; *Canteline v. The State*, 33 Ala. 439.

Judgment affirmed.

EX PARTE RIVERS.

[APPLICATION FOR MANDAMUS TO CIRCUIT COURT.]

1. *Change of venue, on account of incompetency of presiding judge; discontinuance.*—A criminal cause can not be transferred to another county, against the defendant's objection, on the ground that the presiding judge has been of counsel for the prosecution; yet, although such order of transfer is void, if the cause is taken from the docket in consequence of it, and kept off for several years, the prosecution is thereby discontinued.

APPLICATION by John F. Rivers, for a writ of *mandamus* to the circuit court of Barbour, Hon. J. McCaleb Wiley presiding, requiring that court to strike from the docket a certain criminal cause, wherein the State of Alabama was plaintiff, and said Rivers was defendant; the same being an indictment for an assault with intent to murder one Leroy Upshaw. All the material facts are stated in the opinion of the court.

GEO. W. STONE, for the motion.

JOHN W. A. SANFORD, Attorney-General, and RICE, SEMPLE & GOLDTHWAITE, *contra*.

JUDGE, J.—The applicant was indicted, in the circuit court of Barbour county, at the fall term thereof, 1859, for an assault with intent to murder one Leroy Upshaw. At the spring term of said court, 1863, the prosecuting attorney for the State moved the court to transfer the cause to the circuit court of Macon county, upon the ground that the presiding judge had been of counsel for the prosecution; and said motion having been considered by the court, it was ordered by the court that the cause be transferred to the circuit court of Macon county, and that the clerk make out a transcript of the proceedings as in case of a change of venue, and forward the same, together with the papers belonging to the cause, to the clerk of the circuit court of

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Macon county, by the next term thereof. The defendant, being personally present, objected to the ruling of the court transferring the cause as aforesaid, and demanded to be tried in the county of Barbour; which objection was overruled by the court, and the defendant excepted.

After the foregoing order was made, the cause disappeared from the docket, and no other order was made in the cause by the circuit court of Barbour county, until the fall term of said court, 1866, when the solicitor of the circuit moved the court to vacate the previous judgment and order of the court transferring the cause to the circuit court of Macon. The defendant objected to this motion being entertained by the court, alleging as one ground of objection, that eight terms of the court had intervened between the making of the order of transfer, and the motion to vacate said order; but the court overruled the objection, vacated the order of transfer, and directed the cause to be continued in the circuit court of Barbour county, until the then next term thereof. The defendant excepted to the ruling of the court vacating said order, and also to the ruling of the court reinstating the cause. At the next term of said circuit court, (the spring term, 1867,) the defendant moved to strike the cause from the docket, for the reason, that there had been a discontinuance of the prosecution; which motion the court overruled, and the defendant excepted; and on the application of the defendant, the cause was continued.

The eleventh section of the bill of rights secures to the accused, in all criminal prosecutions, the right to a "speedy public trial by an impartial jury of the county or district in which the offense was committed"; and, consequently, in a criminal prosecution, except by the consent of the defendant, as on an application for change of venue, no such order of transfer as that made by the court in this case would be valid.

It is contended in argument, that the order of transfer in this case is a mere nullity, and that no such consequence as claimed by the accused, on his present application, can legally flow from such nullity. "A thing may be void as to some persons or purposes, and valid as to others."—

2 Burrill's Law Dic. 601. In Bacon's Abridgment, (title "*Void and voidable*"), the author says: "Void things are good to some purposes. As, if a lessee for twenty years take a lease for ten years, to begin presently, upon consideration that, if a certain thing be not done, the lease shall be void; in that case, though the second lease be void on the breach of the condition, yet the surrender remains good. So, likewise, if a feoffment be made, to be void on the non-performance of a certain condition; yet, after the feoffor's entry for the condition broken, the feoffee shall have an action for a trespass done by the feoffor before. Also, if a tenant at will grants over his estate, though the grant be void, yet it determines his will."—See, also, *Anderson v. Roberts*, 18 Johnson, 528-9.

Conceding that the order transferring the cause from the Barbour to the Macon circuit court was void, *as an order of transfer*, still the effect of the order was to take the case off the docket of the court where it was rightfully pending; and by the act of the counsel for the State, with the concurrence of the court, and against the objection of the accused, the cause was taken off the docket, and kept off for more than three years. This active and unlawful interference with the pendency of the cause on the docket, by the solicitor, with the leave and concurrence of the court, and against the objection of the accused, amounts, in law, to a discontinuance or abandonment of the prosecution; and this, although the cause was taken and kept off the docket, for a void and illegal purpose, which could never be consummated.

It is conceded, that the mere *neglect* or *passiveness* of a ministerial officer, in relation to the discharge of his official duties, could never produce such a result; but this, as has been seen, is no such case. The court had jurisdiction of the cause; and whether the cause should remain on the docket or not, was a question of judicial cognizance; and it was taken and kept off the docket, as the effect of a judicial order, made at the instance of the State.

The case of *Drinkard v. The State*, (20 Ala. 9,) is in entire harmony with the conclusion here attained, and the

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case of *Harrell v. The State*, (26 Ala. 52,) is not in conflict therewith.

It is therefore ordered, that a rule issue to the judge of the eighth judicial circuit, requiring him to show cause why a writ of *mandamus* should not issue, commanding him to strike the case of *The State v. John F. Rivers*, from the docket of the circuit court of Barbour county.

TURBEVILLE vs. THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. *Charge refused presumed abstract.*—A charge asked and refused will be presumed to be abstract, unless the contrary is affirmatively shown by the record.
2. *Conviction of assault and battery, under indictment for assault with intent to murder.*—Under an indictment for an assault with intent to murder, if the special intent charged is not proved, the defendant may nevertheless be convicted of an assault, or an assault and battery; consequently, a charge to the jury, asserting that they “can not find the defendant guilty” unless the special intent is proved, is properly refused.
3. *Charge on sufficiency of evidence; explanatory charge.*—The court having instructed the jury, at the prisoner’s request, that they must find him not guilty, “unless the evidence was such as to exclude to a moral certainty every supposition but that of his guilt”; it is not error to add, by way of explanation, “that this only means that they must be satisfied beyond a reasonable doubt of his guilt.”

FROM the Circuit Court of Monroe.

Tried before the Hon. JOHN K. HENRY.

THE prisoner in this case was indicted, at the September term, 1865, of said circuit court, for an assault on George W. Rowell and Martha Rowell, with intent to murder them; and was tried, on issue joined on the plea of not guilty, at the April term, 1867, when he reserved the following bill of exceptions:

"Be it remembered, that this case came on to be tried at the spring term, 1867, of said circuit court; and the defendant moved the court to charge the jury as follows: 1st, that unless they believe, from the evidence, beyond a reasonable doubt, that the defendant did assault George W. Rowell and Martha Rowell, with intent to murder them, they can not find the defendant guilty under this indictment; 2d, that unless they believe from the evidence, beyond a reasonable doubt, that the defendant did assault Martha Rowell, as well as George W. Rowell, with intent to murder her, they can not find the defendant guilty under this indictment; 3d, that they must find the defendant not guilty, unless the evidence against him is such as to exclude to a moral certainty every supposition but that of his guilt. The court refused to give the first charge asked, to which refusal the defendant excepted. The court also refused to give the second charge asked, to which defendant excepted. The defendant then asked the court to give the third charge above specified, which charge the court gave, with the following qualification: that the charge given only meant, that the jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant. The defendant excepted to the court refusing to give said charge without said qualification, and to the said qualification given of said charge."

J. W. POSEY, and S. J. CUMMING, for the prisoner.

JOHN W. A. SANFORD, Attorney-General, *contra*.

A. J. WALKER, C. J.—The bill of exceptions in this case does not set forth any evidence whatever. It consists alone of a statement of three requests to charge, of the refusal of two of them, of the giving of the third, with what is denominated a qualification, and of the defendant's exceptions to the refusals to charge, and to the charge given. It is settled in this court, that when a charge is asked and refused, it will be presumed to have been abstract, although otherwise unobjectionable, unless the contrary is shown by a statement of the evidence.—*Morris v. State*, 25 Ala. 57; *Dent v. Portwood*, 17 Ala. 242; *Wilson v. Calvert*, 19 Ala. 274; *Leverett v. Carlisle*, 19 Ala. 80; *Stein*

v. Ashby, 30 Ala. 363; *Partridge v. Forsyth*, 29 Ala. 200; *Brown v. Cockerell*, 33 Ala. 38; *Gunn v. Howell*, 35 Ala. 144; *Aiken v. State*, 35 Ala. 399; *Donohoo v. State*, 36 Ala. 281; *McGehee v. State*, 37 Ala. 161; *Knox v. Easton*, 38 Ala. 345.

2. It is possible that the pertinency of the two charges asked and refused may be inferred from the pleading; and we pass by the question, whether those charges should not be presumed to have been abstract, and therefore properly refused. Even if we concede that those two charges were not abstract, there was a ground upon which the court below was bound to refuse them. They assert that the jury "must find the defendant not guilty," if they entertained a reasonable doubt as to the defendant's intent to murder the two persons specified in the indictment. The law is, that the defendant could have been found guilty in the absence of the intent to murder. The conclusion of not guilty could not be predicated of the premises of the charges; and for that reason, if no other, the defendant had no right to have them given. The precise point was so ruled by this court in *Mooney v. State*, 33 Ala. 419.

3. The third charge asked was, that the defendant should be found not guilty, unless the evidence against him was such as to exclude to a moral certainty every supposition but that of his guilt. This charge the court gave. The complaint is, that the court gave it with the qualification, that the jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant. This charge as given was an indisputably correct statement of the law; and in *Mose v. State*, (36 Ala. 211, 231,) it was decided to be substantially the same with a charge identically the same in substance with the charge asked and given in this case. There was, therefore, no error in charging the jury, that the charge given on the defendant's request had the meaning stated by the court. The charge, as given by the court of its own motion, was an *explanation* of the charge given on request, but was not a *qualification* of it. If, therefore, the court had instructed the jury, that the former was a qualification, it would have been incorrect. But, while the bill of exceptions denominates the former a qualification of the latter, it does not appear that the court so instructed the jury,

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or that any point was made, or exception taken, on the use of the term *qualification* by the court. We can not affirm, either that there was error in the explanatory charge given by the court, or in the manner in which it was given.

The judgment is affirmed.

HATCH *vs.* THE STATE.

[SCIRE FACIAS ON FORFEITED RECOGNIZANCE.]

1. *Nature of proceeding.*—A *scire facias* on a forfeited recognizance in a criminal case, is a civil suit, and not a criminal proceeding.
2. *Release of principal discharges surety.*—Where the principal and his bail are both in court, to answer a *scire facias* on a judgment *nisi*, and the judgment *nisi* is set aside as to the principal, on his plea of pardon, the proceeding against the bail is thereby discontinued, and he is discharged.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. JAMES COBBS.

THE record in this case shows that, on the 26th March, 1866, the following conditional judgment was rendered, in favor of the State, against A. G. Scott and Alfred Hatch :

<p>“ The State of Alabama <i>vs.</i> A. G. Scott and Alfred Hatch.</p>	}	<p>It appearing to the court that A. G. Scott and Alfred Hatch agreed to pay to the State of Alabama the sum of two hundred dollars, unless the said A. G. Scott, the defendant in this cause, appeared here at this term of the court, to answer unto the State of Alabama the offense of retailing without license, &c.; and the said A. G. Scott, being solemnly called to come into court and answer as aforesaid, came not, but, wholly made default : It is therefore ordered by the court that the State of Alabama, for the use of Marengo county, recover of the said A. G. Scott and Alfred Hatch the said sum of two hundred dollars, for their default aforesaid, and</p>
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also costs of suit, unless they appear here at the next term of this court, and show cause why this judgment should not be made absolute against them; and that notice issue to said defendants accordingly."

A *scire facias* was issued on this judgment, addressed to "any sheriff of the State of Alabama," and was returned "not found" as to both of the defendants; and an *alias* was afterwards issued, which was returned "executed" on Hatch, and "not found" as to Scott. On the 3d December, 1866, the following judgment was rendered in the case:

"The State of Alabama } This day came the so-
vs. } licitor who prosecutes for

A. G. Scott and Alfred Hatch. } the State of Alabama,
and also came the defendants, by their attorneys; and the defendant Hatch demurred to the *scire facias*; and the same being considered by the court, it is ordered by the court, that the demurrer be overruled, and that the defendant answer over. The defendant then filed his plea, to which plea the solicitor on behalf of the State demurred; and the same being considered by the court, the demurrer to the plea of the defendant is sustained; and the defendant Hatch declining to plead further, but saving all exceptions to the ruling of the court, it is considered and ordered by the court, that the judgment *nisi* heretofore rendered in this cause be made absolute and final against said defendant Alfred Hatch, and that the State of Alabama, for the use of Marengo county, recover of said defendant Alfred Hatch said sum of two hundred dollars for his default aforesaid, for which execution may issue. And the other defendant, A. G. Scott, having pleaded in short the pardon of the governor of the State of Alabama, it is considered and ordered by the court, that the judgment *nisi* aforesaid, heretofore rendered in this cause, be set aside as to him, on payment of the costs of this suit by the said A. G. Scott, for which execution may issue."

The ground specified in the demurrer to the *scire facias* was, that it was addressed to any sheriff of the State, instead of being addressed to the defendants. The plea interposed by Hatch set up the governor's pardon to Scott. The final judgment, the overruling of the demurrer to the

scire facias, and the sustaining of the demurrer to the plea, are now assigned as error.

RICE, SEMPLE & GOLDTHWAITE, and WM. E. CLARKE, for the appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

BYRD, J.—This is a civil suit, and not a criminal proceeding; and we must reverse the judgment against the appellant, upon the authority and reasoning of the following cases, and the point hereafter next stated: *Howie & Morrison v. The State*, 1 Ala. 113; *The State v. Hinson*, 4 Ala. 673; *Governor, use &c., v. Knight*, 8 Ala. 297.

The court erred in entering judgment final against the surety, and setting aside the judgment *nisi* against the principal, in the same entry. The surety and principal being in court, the setting aside of the judgment *nisi* as to the latter, operated a discontinuance of the cause as to the former; and there is, therefore, no object to be accomplished by remanding the cause.

The judgment must be reversed as to the appellant, and a judgment here rendered, setting aside the judgment *nisi* in the court below against him.

PEARCE vs. THE STATE.

(INDICTMENT FOR RETAILING SPIRITUOUS LIQUORS.)

1. *Retailing; relevancy of acts not covered by indictment*.—When the evidence adduced by the prosecution, under an indictment for retailing spirituous liquors, tends to prove a sale of spirituous liquor by the defendant at a public administrator's sale in the country, and that the liquor was drunk by the purchaser on or about the premises; proof of another sale of liquor by the defendant, to other persons, at the same public sale, and under similar circumstances, is competent evidence for the prosecution, "to illustrate the character of the first sale, and to show knowledge by the defendant that the liquor sold to the first purchaser was drunk about the premises."

2. *Same; selling liquor drunk on or about premises.*—*Held*, on the authority of *Brown v. The State*, (31 Ala. 353,) *Easterling v. The State*, (30 Ala. 48,) and *Patterson v. The State*, (36 Ala. 298,) that the defendant's buggy, in which he carried liquor for sale at a public administrator's sale in the country, constituted *his premises*, within the meaning of the statute, (Code, § 1058,) and that the charge of the court to the jury as to what was necessary to constitute the offense of selling liquor "to be drunk on or about the premises", was correct.

FROM the Circuit Court of Lowndes.

Tried before the Hon. GEO. GOLDTHWAITE.

THE indictment in this case was found at the April term, 1866, and contained three counts: the first charging, that the defendant "unlawfully sold vinous or spirituous liquors, in quantities less than a quart"; the second, that he sold such liquors, "by the quart, to ———, a person of known intemperate habits"; and the third, that he sold such liquors without a license, and contrary to law, "and did then and there suffer the same to be drunk on or about his premises." The trial was had, on issue joined on the plea of not guilty, at the April term, 1867, when the following bill of exceptions was reserved by the defendant.

"The State introduced James Magruder as a witness, who testified that, in the latter part of November, 1865, at a public sale of Mrs. Gilmer's as administratrix, in said county of Lowndes, he asked, in the presence of defendant, if there was any liquor to be had; that defendant immediately spoke, and said that he knew where he could get some, or that he would or could let him have some; that the witness and said defendant, and some three or four other persons whom witness invited, then went to a point among some trees, some one hundred or one hundred and fifty yards from the house, and some two hundred yards from the public road, and defendant then and there sold him a quart of liquor or apple-brandy, in a quart bottle, the liquor being already in the bottle, which defendant took from a buggy; that witness took the bottle, and, with the three or four friends who were with him, went off from the buggy, and where defendant was, some twenty or thirty steps, among some trees, and stopped, and there drank the liquor from the bottle; that there was no other person

present at the time and place witness purchased the liquor, nor at the time and place it was drunk, than the friends who went with him, and that no other persons were in sight; that the crowd was off at the house; that he and his friends were not in sight of the road at the time of the drinking of the liquor; that he could not say whether defendant could see them, nor whether he, defendant, could be seen by them at the time they drank the liquor; that the space between defendant and where the liquor was drunk, was thickly set with trees, and there was no loud talking at the time of the drinking. The State next introduced one George Wood, and the solicitor asked him, whether he had ever purchased any liquor from defendant, and if so, where and when? The defendant's counsel objected to the witness answering the question, and asked the witness if he knew anything about the selling or the drinking detailed by the witness Magruder; to which the witness answered, that he did not. Thereupon, defendant objected to the witness being examined at all, in reference to the drinking testified to by Magruder; but, the solicitor stating that the object in proving other acts was not to convict for them, but to show knowledge by defendant that the liquor sold to Magruder was drunk about the premises, and to illustrate the character of the said sale to Magruder, the objection was overruled, and defendant excepted.

"The witness, being then examined by the State's counsel, stated, that on the same day referred to by the witness Magruder, and during the same sale, (Mrs. Gilmer's,) and at the same buggy and place, but at a different time, and when said Magruder was not present, he purchased a quart of liquor (apple-brandy) from the defendant; that the liquor he purchased was taken by defendant from a buggy, and was already bottled; that the buggy was in the woods, and the witness took the bottle, and, with several friends whom he invited, went off from the buggy some ten or fifteen steps, among some trees and undergrowth, and there drank the liquor; that no one was present except the friends whom he invited, and that he could not state whether they could be seen by defendant or not, nor whether defendant could be seen from where they were; that there

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was no loud talking at the time of the drinking ; that the crowd was some distance off, and that they (witness and his friends) could not be seen from where the crowd was. Defendant moved to exclude all the testimony of Wood, in reference to the purchase made by him, and the drinking by him and his friends ; but the court overruled the motion, and the defendant excepted. Said Wood further testified, that after having bought and drunk the one bottle of apple-brandy mentioned by him, he again came with several friends invited by him, and bought from defendant, at the same buggy and place, and on the same day and during the same sale, (of Mrs. Gilmer,) another bottle of apple brandy, which he and said friends drank there, at or about ten or fifteen paces from defendant's said buggy, and at the same place where the first bottle bought by him was drunk. Defendant objected also to this ; but the court overruled the objection, and permitted the evidence to go to the jury.

“This being all the evidence in the case, the court charged the jury, that if the evidence proved that the defendant went to the sale of Mrs. Gilmer, knowing it was a public sale, and carried spirituous liquors in his buggy to sell to persons who might be at said sale, and sold said liquor by the quart, from his buggy, to such persons, indiscriminately, and that the same was drunk on or about the premises, such acts would be within the evil contemplated by the law against retailing without a license ; and that, under such circumstances, the place occupied by him with his buggy, out of which such liquor was sold by him, would be his premises ; and that if the evidence proved he sold liquor by the quart to Maynard, (the witness,) in Lowndes county, under such circumstances, in the latter part of November, 1865, and that said liquor was drunk by the said Maynard, on or about said premises of said defendant, that by the defendant so selling said liquor to said Maynard, and it being drunk by him on or about said premises, the defendant was guilty of retailing spirituous liquors without license, if he had no license to retail spirits, although said defendant did not give said Maynard permission to drink

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said liquor on or about his premises, and did not know that the same was so drunk.

“The defendant objected to this charge, and then asked the court, in writing, to charge the jury as follows: 1st, that it is necessary, to constitute the guilt of the defendant, that he should have consented that the liquor be drunk on or about the premises; 2d, that if the jury find that the defendant sold the liquor to Maynard, without knowing that it would be drunk on or about the premises, and without knowing that it was being drunk on or about the premises, and without any consent on his (defendant's) part that it should be drunk on or about the premises, and that the liquor was, in fact, carried beyond the view and control of the defendant, and out of sight from the place where it was sold, and that the defendant did not know, and could not have known where the liquor was drunk, and could not have seen the persons drinking it from where he was, and where he sold it, then the jury cannot find the defendant guilty. The court refused to give each of said charges, and to each refusal defendant excepted.”

CLEMENTS & WILLIAMSON, for the prisoner.

JNO. W. A. SANFORD, Attorney-General, *contra*.

JUDGE, J.—The State relied for a conviction upon the sale to Maynard; and after proving this sale, the court permitted evidence to be introduced of other sales, to another person, at other and different times, “not to convict for them, but to show knowledge by defendant that the liquor sold to Maynard was drunk about the premises, and to illustrate the character of the sale to Maynard.” Under the particular circumstances of this case, this evidence was admissible for the purpose stated.

2. We have carefully examined the charge which the court gave to the jury, and the two charges requested by the defendant, which the court refused to give; and, on the authority of the previous adjudications of this court upon the question, we hold, that the court committed no error in its rulings in relation to them.—*Brown v. The State*, 31 Ala.

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353; *Easterling v. The State*, 30 Ala. 48; *Patterson v. The State*, 36 Ala. 298.

There being no error in the record, the judgment must be affirmed.

FROLICKSTEIN vs. MAYOR OF MOBILE.

[PROSECUTION FOR VIOLATION OF MUNICIPAL ORDINANCE.]

1. *Constitutionality of law prohibiting sale of goods on Sunday, as applicable to Jews.*—A statute, or municipal ordinance, prohibiting the sale of goods by merchants on Sunday, in its application to religious Jews, "who believe that it is their religious duty to abstain from work on Saturday, and to work on all the other six days of the week," is not violative of the 3d section of the 1st article of the State constitution, which declares that no person shall, "upon any pretense whatever, be hurt, molested, or restrained, in his religious sentiments or persuasions."

APPEAL from the City Court of Mobile.

Tried before the Hon. H. CHAMBERLAIN.

THE appellant in this case was fined twenty-five dollars by the mayor of Mobile, for the violation of a municipal ordinance prohibiting the sale of goods by merchants on Sunday, and carried the case, by appeal, into the city court, where a complaint was filed against him, in the name of "the mayor, aldermen, and common council of the city of Mobile," in the following words: "The plaintiff claims of the defendant the sum of twenty-five dollars, as a penalty for the breach by the defendant of section 305 of a city ordinance, entitled 'An ordinance to regulate the observance of the Christian Sabbath day,' which ordinance is fully set forth in the compilation of ordinances called the 'Municipal Laws,' in chapter 35 of said compilation; which ordinance is hereby made a part of this complaint. And plaintiff avers, that the defendant did, on the 21st

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day of January, 1866, within the corporate limits of said city, he being a keeper of a dry-goods store, where goods and merchandise are sold, allow the same to be kept open, or did sell or permit to be sold, or endeavor to sell, or permit such endeavor to sell, certain goods, wares, or merchandise therein, on the Christian Sabbath day, contrary to, and in violation of, said city ordinance; whereby defendant became liable to pay the plaintiff the said sum of twenty-five dollars penalty, as aforesaid, for breach of said city ordinance as aforesaid."

On the trial in the city court, the cause was submitted to the court for decision, on the following agreed statement of facts: "It is admitted in this case, that the defendant, Frolickstein, sold a pair of *shoes*, on Sunday, the first day of the week, known as the Christian Sabbath. But it is also admitted, that the defendant is a Jew by birth, and a strict member of the Jewish church, and believing in the religion and faith of the Jewish church; that according to the religious faith of the Jews, Saturday is the Sabbath, and on that day the defendant *does no work*, because he is so commanded by the law of Moses, and the defendant believes such to be the command of God; but by the same command, and by the same faith, which is his religious belief, and is also the faith and belief of the Jewish church, he, and all Jews, believe that it is their religious duty to work on all of the other six days of the week; that in obedience to his religious belief, and the command aforesaid, he sold said pair of *shoes*, and not otherwise, on Sunday, which is the Christian Sabbath. Upon these facts, the case is submitted to the court, as on a special verdict, and the judgment of the court is prayed thereon."

On these facts, the court rendered judgment against the defendant, for the amount of the penalty prescribed by the ordinance; to which the defendant excepted, and which he now assigns as error.

DARGAN & TAYLOR, for appellant.

W. BOYLES, and C. F. MOULTON, *contra*.

A. J. WALKER, C. J.—The third section of the first article of the constitution prescribes, “that no person within the State shall, upon any pretense whatever, * * * be hurt, molested, or restrained, in his religious sentiments or persuasions, provided he does not disturb others in their religious worship.” It is said that the appellant is a pious Jew, whose religious sentiments and persuasions lead him to the conviction that it is his duty to labor the other six days in the week besides Saturday, and that he is therefore restrained in his religious sentiments or persuasions by a municipal regulation, which forbids him to sell goods from his store on the first day of the week. The law does not hurt, molest, or restrain the appellant, in the entertainment or expression of what he regards as a religious sentiment or persuasion. It simply prohibits the performance of an act, which he supposes to be required by a religious duty. It can not be that the constitution designed to exclude from the prohibitory power of legislation every act, which a sentiment or persuasion, regarded by any one as of a religious character, may dictate. Such a doctrine would lead to the constrained toleration of crime, equally abhorrent to the Jew and the Christian. Acts must at least be the fruit of a sentiment or persuasion *in fact* religious, in order that an immunity from legislative prohibition may be claimed. It would be subversive of good government to subordinate the power of restraining acts prejudicial to the public welfare, and productive of social injury, to the convictions of each individual as to the acts which religious sentiment may demand. However much we may respect the conscientiousness and religious devotion of the appellant, we can not regard the rule which he prescribes for himself, otherwise than as an industrial regulation, which is not required by a sentiment in fact religious, although so conscientiously regarded by him. We do not think that the terms used in the constitution are susceptible of such meaning as would negative the power of the legislature to prohibit the act done by the appellant on Sunday.

The legally constrained abstinence from certain worldly employments on the first day of the week can not be jus-

tified upon the ground, that such abstinence is enjoined by the Christian religion. The legislature is under constitutional restrictions against compelling the observance of a Christian, or Jewish, or any other religious institution, because it is such. But the legislature is not prohibited from making municipal regulations, because they have the sanction also of a religious society. The legislation on the subject of abstaining from worldly employments on the first day of the week is referred to the police power of the legislature. It has its sanction in the teaching of experience, that the general welfare and the good of society require a suspension of labor and business for one day in seven, and that that day should be one of uniform observance. The exercise of the power to enforce this theory of public good would not infringe the constitution, whether the designated day should be the Christian or the Jewish Sabbath.

Affirmed.

THE STATE *vs.* WHITLEY.

[SCIRE FACIAS ON FORFEITED RECOGNIZANCE.]

1. *Admissibility of parol evidence in aid of recognizance.*—Where a recognizance, or undertaking of bail, taken by a justice of the peace, is conditioned for the appearance of the principal at the next term of the circuit court, “to answer any indictment found against him”, not specifying or referring to any particular offense, parol evidence cannot be received, in a proceeding by *scire facias* against the bail, to connect the recognizance or undertaking with any particular case.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. GEO. GOLDTHWAITE.

THE record in this case shows that, on the 13th December, 1865, James A. Whitley was arrested on a charge

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of grand larceny, and was carried before a justice of the peace for examination; that the justice took from him a recognizance, or undertaking of bail, with W. P. Whitley and W. P. Bullock as his sureties, the condition of which was, "that the said James A. Whitley appear at the next term of the circuit court of Lowndes county, and from term to term thereafter, until discharged by law, to answer any indictment found against him"; that, at the next term of the circuit court, an indictment was found against him, Hilliard Whitley, and Joshua Alexander, charging them with the larceny of a bale of cotton, the personal property of Larkin Cottrell, of the value of one hundred dollars; and that a judgment *nisi* was entered against them, at the same term of the court, in the following words:

<p>"The State vs. James A. Whitley, Hilliard Whitley, Joshua Alexander.</p>	}	<p>Indictment for grand larceny. It appearing to the court that the said James A. Whitley, W. B. Whitley, and W. P. Bullock, agreed to pay the State of Alabama one thousand dollars, unless he, the said James A. Whitley, appeared at this term of the court to answer in this case; and the said James A. Whitley having failed to appear,—it is ordered, that the State of Alabama, for the use of Lowndes county, recover of the said James A. Whitley, W. B. Whitley, and W. P. Bullock, on such undertaking, the sum of one thousand dollars, unless they appear at the next term of this court, and show cause why this judgment should not be made absolute."</p>
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On this judgment, a *scire facias* was issued, which was returned "Executed, August 9, 1866, on W. B. Whitley and W. P. Bullock; *non est* for James A. Whitley." A complaint was filed on the forfeited undertaking, in the name of the State, for the use of Lowndes county, which was entitled of the spring term, 1866, and which averred, that the recognizance, or undertaking of bail, was taken in the same case in which the indictment was found. At the November term, 1866, as the bill of exceptions states, "it was agreed between the parties, that the complaint on file should stand in lieu of the *scire facias*. The State then offered to prove, by parol, the following facts set out in said complaint: that

the bond was taken by the justice in the course of the proceedings before him, as stated in the complaint, and was returned to the grand jury, with the transcript of the proceedings before the justice, and the original papers in the examination before him; that the grand jury returned said indictment into court, with said transcript and papers; and that said indictment was found in the same case in which said bond was taken. The defendants objected to this evidence, and each part thereof, but admitted the other facts stated in the declaration to be true. The court decided, that the parol testimony, as above set forth, was incompetent, and rendered judgment in favor of the defendants; to which ruling and judgment the State excepted", and which are now assigned as error.

JOHN W. A. SANFORD, Attorney-General, and CLEMENTS & WILLIAMSON, for appellant.

WATTS & TROY, *contra*.

JUDGE, J.—Section 3679 of the Code provides, that an undertaking of bail is "forfeited by the failure of the defendant to appear, although the offense, judgment, or other matter, is *incorrectly described* in such undertaking; the particular case, or matter to which the undertaking is applicable, being made to appear to the court."

The undertaking of bail relied on in this case stipulated that James A. Whitley should appear at the then next term of the circuit court of Lowndes county, and from term to term thereafter, until discharged by law, "*to answer to any indictment found against him.*" There is no *incorrect description* of an offense in this undertaking; on the contrary, no offense is named, and no reference whatever made to any particular case or prosecution. It was never intended by the section of the Code above cited, to dispense with all description of, and reference to, the particular offense charged. This view is not in conflict with the cases of *The State v. Eldred*, (31 Ala. 393,) and *Vasser v. The State*, (32 Ala. 586.)

The circuit court correctly ruled out the parol evidence offered by the State; and there being no error in the record, the judgment is affirmed.

EX PARTE GROOM.

[APPLICATION FOR MANDAMUS TO CIRCUIT COURT.]

1. *Transfer of cause from State to Federal court.*—The 12th section of the judiciary act of 1789, which makes provision for the transfer of a cause, from the State court in which it originated, into “the next *circutt* court” [of the United States] to be held in the district where the suit is pending,” does not authorize the transfer of such cause into the Federal *district* court, although that court exercises some of the powers of a circuit court; consequently, where the application asks the removal of a cause into “the next circuit court of the United States to be held for the district where said suit is pending, to-wit, the middle district of the State of Alabama,” and is accompanied by an offer of good security for the defendant’s personal appearance “in the circuit court of the United States to be held for the middle district of the State of Alabama,” the application is properly refused. (BYRD, J., *dissenting*, held the application sufficient.)

APPLICATION by Benj. B. Groom, for a writ of *mandamus* to the circuit court of Montgomery, Hon. GEORGE GOLDTHWAITE presiding, to compel that court to transfer to the proper Federal court a cause therein pending, between Frederick H. Cobb as plaintiff, and said Benjamin B. Groom as defendant. The action was commenced by original attachment, on the 20th November, 1866, and was founded on an alleged deceit in the sale of several mules by the defendant to the plaintiff. The plaintiff was a citizen of Alabama, and the defendant a citizen of Kentucky; and the damages claimed in the suit were eight thousand dollars. The circuit court overruled and refused the application for the removal of the cause, and the petitioner reserved a bill of exceptions to its ruling and decision; and he now applies to this court for a *mandamus*, requiring the circuit court to transfer the cause as prayed.

WATTS & TROY, for the motion.

ELMORE, KEYES & MORRISSETT, *contra*.

A. J. WALKER, C. J.—An application was made for the removal of a cause from the circuit court of Montgomery county, into the circuit court of the United States for the district where the suit is pending. The application was accompanied by an offer by the applicant of “good and sufficient surety for his entering into the circuit court of the United States, to be held *for the middle district of the State of Alabama*,” &c. This application was made under the 12th section of the judiciary act of 1789. That act requires, that the removal should be made into the “next circuit court to be held in the district where the suit is pending.” The removal is required to be made into the circuit court, designated *eo nomine*. The district court of the United States is not the circuit court, although it may exercise the powers of a circuit court; and there is a clear distinction observed in the acts of congress, between the circuit courts and the district courts, notwithstanding they may exercise some of the powers of the circuit court. There is, therefore, no warrant in the law for the removal of this cause into the district court of the United States for the middle district of Alabama. The fifth circuit of the United States is composed of the “districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.” A circuit court for the district of Alabama is held at Mobile,—a single place within the State. There is, therefore, a circuit court for the district of the State of Alabama. There is no such court as a circuit court for the middle district of Alabama. The petitioner, in offering to give surety for entering the cause in the circuit court for the middle district of the State of Alabama, did not offer to comply with the act of congress, which requires that he should offer good and sufficient surety for his entering copies of the process, appearing, &c., in the circuit court for the district of the State of Alabama.

The present application was properly overruled. If the application had been accompanied with an offer to enter the process, appear, &c., in the circuit court for the district of the State of Alabama, it ought to have been granted.

The application for a *mandamus* is refused.

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BYRD, J.—I concur in the opinion of the court, except that I hold that the circuit court of the United States for the State of Alabama includes the middle district of Alabama, and is therefore, in contemplation of law, the circuit court for that district. I think that the application is sufficiently definite for all practical purposes.

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[ACTION FOR VALUE OF SLAVES EMANCIPATED.]

1. *Abolition of slavery by act of war.*—Slavery was destroyed in Alabama by the act of war, prior to the passage of the ordinance of the State convention on the 22d September, 1865.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. JOHN MOORE.

THIS action was brought by Mrs. Frances L. Logan, against the State of Alabama, to recover the value of certain slaves belonging to the plaintiff, which were alleged to have been emancipated by the act of the defendant, without the consent of the plaintiff, and without an offer or tender of compensation. The complaint contained two counts, one in case, and one in trover. The rulings of the court on the pleadings, and in the charges to the jury, were adverse to the plaintiff's right of recovery; and those rulings are now assigned as error. A statement of the facts in detail is not necessary to a correct understanding of the opinion.

GEO. W. GAYLE, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

JUDGE, J.—In the case of *Ferdinand Smith v. The State*, decided at the January term, 1866, (39 Ala. 706,) we

held as follows: "It is not denied that slavery has had no existence in this State, since the 22d day of September, 1865, on which day the State convention, then assembled at the city of Montgomery, acted on the subject; but it is urged that it did exist in law, if not in fact, until that action was had. This position amounts to a denial of the legality of the destruction of slavery by the act of war,—a question it would be utterly vain and useless to discuss. It is a historical fact, that the consummation was effected by the act of war, anterior to the action of the State convention; and whether justly or unjustly, legally or illegally, are not now practical questions. This was the view, in effect, taken by the State convention, in its action above referred to. That body was not guilty of the absurdity of abolishing slavery, which did not then exist; but it gave a high and solemn sanction to the truth of the fact, before well known, that the 'institution' of slavery had 'been destroyed in the State of Alabama,' by expressly so declaring, and prohibiting the existence of slavery in the State, in the future, except as a punishment for crime.—Ordinance No. 6, p. 45."

The counsel for appellant earnestly and ably contends for a decision in this case, which would be in direct hostility to the conclusion attained upon the same question, in *Smith v. The State, supra*. We decline to disturb the decision in that case; and upon its authority, the judgment of the court below in this case must be affirmed.

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2. *Release of principal discharges surety.*—Where the principal and his bail are both in court, to answer a *scire facias* on a judgment *nisi*, and the judgment *nisi* is set aside as to the principal, on his plea of pardon, the proceeding against the bail is thereby discontinued, and he is discharged.—*Hatch v. The State*..... 718
3. *Nature of proceeding by sci. fa.*—A *scire facias* on a forfeited recognizance in a criminal case, is a civil suit, and not a criminal proceeding.—*S. C.*..... 718
4. *Sufficiency of sci. fa.*—In proceedings on a forfeited recognizance, it is not necessary that the notice, or *scire facias* should be in exact or literal conformity with the form given in section 704 of the Penal Code; and the fact that it is directed to “any sheriff of the State”, commanding him to notify the defendants, instead of being directed to the defendants themselves, does not render it invalid or insufficient.—*Grund v. The State*..... 709
5. *Admissibility of parol evidence in aid of recognizance.*—Where a recognizance, or undertaking of bail, taken by a justice of the peace, is conditioned for the appearance of the principal at the next term of the circuit court, “to answer any indictment found against him”, not specifying or referring to any particular offense, parol evidence cannot be received, in a proceeding by *scire facias* against the bail, to connect the recognizance or undertaking with any particular case.—*The State v. Whitley*..... 728

BAILMENT.

1. *What constitutes, and rights of bailee.*—A contract by which the vendor of cotton stipulates with the purchaser that he “will protect it from weather and stock as if it was still his own”, and deliver it, when required, free of charge, at a specified railroad depot, constitutes the vendor the bailee of the purchaser, but gives him no power or authority to consent to the larceny or removal of the cotton by another person; and if the cotton is stolen or removed by a third person, the bailee’s assent to the larceny or removal does not affect the character of the act.—*Oakley v. The State*..... 373
2. *Liability of common carrier for loss by robbery; admissibility of custom.*—The owners of a steamboat are liable, as common carriers, for a loss of goods by robbery; and where the only exception specified in the bill of lading is “dangers of the river,” parol evidence cannot be received to show a custom among the persons who were engaged in navigating the river, which exempted the owners of the boat from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew. (Overruling *Steele v. McTyler’s Adm’r*, 31 Ala. 667.)—*Boon & Co. v. Steamboat Belfast*..... 184
3. *Hiring of slave; loss of services.*—In the absence of an express stipulation in a contract for the hiring of a slave, the hirer must bear all losses which occur during the term, except those which are caused by the act or conduct of the owner.—*Leslie v. Langham’s Executors*..... 524

BILL OF EXCEPTIONS.

1. *When necessary in criminal case.*—The appellate court cannot revise the action of the primary court in *overruling* a plea of *nul tiel* record, to a *scire facias* against a defaulting witness, unless the evidence on which it was made is presented by bill of exceptions.—*Pomeroy v. The State*..... 63
2. *When necessary in probate case.*—Under section 1891 of the Code, as amended by the act approved December 12, 1857, (Session Acts, 1857–8, p. 244,) a bill of exceptions is not necessary to enable the appellate court to revise a decree of the probate court, rendered on final settlement of a guardian's accounts, when the error complained of appears on the face of the decree.—*Watson v. Stone*.... 450
3. *Construction of.*—A recital in the bill of exceptions, in a criminal case, that "the refusal of the court to give the charge asked, and the conviction and sentence, are assigned as error", is equivalent to an exception to the conviction and sentence.—*Frank v. The State*..... 9
4. *Same.*—Where the bill of exceptions, after setting out the evidence and the charge of the court, concludes in the usual form, "and this is signed and sealed as plaintiff's bill of exceptions", this is not sufficient to show that an exception was reserved to the charge of the court.—*Foster v. Hightower*..... 295

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Action on note, by assignee against maker; sufficiency of complaint.* In an action on a promissory note, by an assignee against the maker, the complaint must aver the assignment, or contain some other averment showing the plaintiff's ownership of the note; and the want of such an averment is a substantial defect, (Code, § 2405,) for which a judgment by default will be reversed on error. (BYRD, J., *dissenting*.)—*Douglas v. Beasley*..... 142
2. *Parol agreement for discharge of note in Confederate money.*—Where a promissory note, given for the hire of a slave for the year 1865, on its face was payable in money, a parol understanding between the parties, that it might be paid or discharged in Confederate States treasury-notes, can not be received to defeat a recovery on it: the ordinance of the State convention, No. 26, adopted on the 28th September, 1865, does not apply to such case.—*Leslie v. Langham's Executors*..... 525
3. *United States internal-revenue stamp on note.*—Under the United States "stamp act" of 1863, (U. S. Statutes at large, 39th congress, 143,) it is not necessary that an internal-revenue stamp should be affixed to a promissory note executed in a foreign country, and payable generally, in order to make it admissible in evidence; and if it was executed at any place within the United States, at which no collection district was at that time established, a stamp might be affixed to it, by "any party having an interest therein," at any time prior to the 1st January, 1867; and in the latter case, the cancellation of the stamp is not necessary.—*Blunt v. Bates* .. 470
4. *Attorney's authority to affix stamp to note.*—An attorney-at-law, in whose hands a note is placed for collection, has such an interest

BILL OF EXCHANGE, AND PROMISSORY NOTES—CONTINUED.

therein by virtue of his general authority, as authorizes him to affix an internal-revenue stamp to the note, when necessary to protect the interests of his client; and such act on his part will be presumed to have been authorized, until repudiated by his client.—*S. C.*..... 470

CHANCERY.

I. JURISDICTION.

1. *To enforce statutory right to replevy.*—When a stranger offers to replevy for the benefit of the defendant, and his offer is improperly refused by the sheriff, he may enforce his statutory right, for the benefit of the defendant, in a court of law; but he has no such interest in the subject-matter of the suit as authorizes him to come into equity for relief, although he also alleges that, after refusing his offer, the sheriff allowed the goods to be replevied by other strangers, who therein acted at the instance, and for the benefit of the plaintiff.—*Kirk v. Morris*..... 225
2. *Cancellation of deed. on grounds of fraud, duress, and undue influence.*—A deed of gift, by which the grantor conveyed all his property, real and personal, to his living children by his first wife, excluding the children of two deceased sons by her, and all his children by his second wife, reserving to himself only the right of possession and a support during his life,—cancelled and set aside, at his instance, on proof that he was seventy years of age, illiterate, and enfeebled in will and intellect; that he had long cherished and expressed a desire and intention to provide for his children by his second wife, who were born out of lawful wedlock; that his elder sons, who were resolute and determined men, were cognizant of this desire and intention on his part, and opposed its execution; that they had taken possession by force of more than forty of his slaves, in order to prevent the consummation of a contract of sale which he was about to make, preparatory to a settlement on his second wife and children; that the deed was executed for the purpose on his part of procuring the restoration of these slaves, and that they were restored to him immediately after the execution of the deed.—*Fuller's Adm'r v. Fuller*..... 301
3. *Discovery and account; when bill lies by wife.*—Although the husband is not accountable to the wife for the profits realized from a mercantile partnership, in which he had invested moneys belonging to her statutory separate estate; and although she cannot maintain a bill in equity against his surviving partner, for an account of the profits realized by the partnership business, after the death of the husband; yet her bill may be maintained as an ordinary bill for discovery and account, if it contains the necessary allegations as to the complication of the accounts, and the necessity of a discovery from the books of the partnership.—*Dent v. Slough*..... 518
4. *Assignment of dower.*—The rule is settled, that courts of equity will, in all cases, entertain concurrent jurisdiction with courts of law in the assignment of dower.—*Brooks v. Woods*..... 538

CHANCERY—CONTINUED.

5. *Vendor's lien paramount to widow's dower.*—Where the purchaser gives his notes, without security, for the agreed price of the land, and the vendor conveys the title to him by deed, the vendor's lien on the land for the unpaid purchase-money is superior to the right of dower on the part of the purchaser's widow.—*S. C.*..... 538
6. *Equitable estoppel; what constitutes.*—If a party who is interested in an estate, and who has knowledge of his rights, misleads another into dealing with the estate, he will be postponed in equity to the party so misled, and will be required to make good his representations, even to the extent of any claim or title he may have in or to the estate; and this, though the representations are verbal, and without consideration moving directly to him. *David v. Shepard*..... 587
7. *Equitable relief on grounds of estoppel and fraud, where remedy at law is adequate.*—A bill which alleges that the plaintiff, while negotiating with a purchaser at sheriff's sale for a tract of land, on learning that the land was in the adverse possession of the defendant, broke off the negotiations, and declined to proceed further with the contract; that the defendant thereupon came to him, begged him to make the purchase, and verbally promised to surrender the possession immediately, and to waive all his title and claim of every sort, reserving only his statutory right of redemption; that, relying on this promise, plaintiff consummated the contract; that the defendant afterwards refused to surrender the possession, and asserted title in himself, and set up his adverse possession to defeat an action at law brought by plaintiff to recover the land; that the defendant in execution, at the time of the sheriff's sale, had either the legal title to the land, or a complete equitable title; but that all his title-deeds were in the defendant's possession, and therefore plaintiff could not show title at law,—whether considered as seeking to enforce an estoppel, or as asking relief against fraud, is without equity, because it shows that the plaintiff has an adequate remedy at law.—*S. C.*..... 587
8. *Specific performance, as matter of discretion.*—Under bills for the specific performance of contracts, the chancery court exercises a discretionary power of granting or refusing its aid, not arbitrarily or capriciously, but upon a sound and temperate consideration of the facts of each particular case, as tested by existing rules; and if, under all the circumstances of the case, a specific performance would be inequitable, relief will not be granted.—*Gentry v. Rogers*..... 442
9. *Same, as affected by offer to perform by plaintiff.*—If the vendor refuses to deliver the possession of the land on the demand of the purchaser, and refuses to accept payment of the first installment of the purchase-money when due and tendered, and declares that he will not comply with the terms of the contract, the purchaser may immediately sue at law for a breach of the contract, or seek relief in equity; but, if he fails to seek any legal redress until after the day stipulated for the payment of

CHANCERY—CONTINUED.

- the residue of the purchase-money, the former repudiation of the contract by the vendor does not excuse him from showing an offer on his part, on the specified day, to perform all the stipulations of the contract.—*S. C.*..... 442
10. *Same, as affected by laches.*—The purchaser in this case having been distinctly notified by the vendor, two years before the day fixed for the payment of the purchase-money, that he repudiated the contract, and having delayed to file his bill for a specific performance for about nine months after that day, and having shown no excuse for his delay,—the laches was held sufficient, in connection with his failure to show a valid excuse for his omission to tender performance in full on the specified day, to deprive him of the right to relief.—*S. C.*..... 442
11. *Vendor's lien, and assignment thereof.*—A vendor's lien for the unpaid purchase-money of land, which is but an incident to the debt, passes to an assignee of the purchaser's note, in the absence of a stipulation to the contrary; but, if the vendor exchanges the purchaser's note, for the note of a remote sub-purchaser, which is also secured by a vendor's lien on the land, although that lien passes to him by the transfer, he can not set it up against the party from whom he received it, in defense of a bill for the reformation of his bond for title, and the specific performance of his original contract, but must become the actor in a separate proceeding.—*Day v. Preskett.*..... 624
12. *Same.*—A writing is not necessary to constitute a valid assignment of a debt for the unpaid purchase-money of land, or to make it effectual as an equitable assignment of the vendor's lien; and where the title remains in the vendor, the lien passes to the assignee with the debt, unless it is waived upon some consideration valid in law, or by some act operating by way of estoppel: neither the fact that the assignee accepted the transfer of the debt on the faith of the purchaser's promise to pay it in a short time, nor the fact that the purchaser's note was delivered up to him at the time of the transfer, nor these two facts combined, are sufficient to show such waiver.—*Magruder v. Campbell.*..... 611
13. *Extinguishment of debt and vendor's lien.*—If the vendor, by subsequent agreement with the purchaser, surrenders the note given for the purchase-money, and accepts in exchange for it the note of a sub-purchaser, his debt on the original purchaser is thereby extinguished, and with it the accompanying vendor's lien.—*Dennis v. Williams.*..... 633
14. *Tender of deed to purchaser, as necessary to perfect right to foreclose vendor's lien.*—When the purchaser's note contains a stipulation, that it is not to be due and payable until titles to the land have been made to him, a tender of such title, or some valid excuse for the failure to make such tender, is indispensable to the equity of a bill which seeks to enforce the vendor's lien; and such tender in the bill, unaccompanied by a valid excuse for the failure to make it before filing the bill, is not sufficient.—*S. C.*..... 633
15. *Stale demand; presumption of settlement of estate and payment of*

CHANCERY—CONTINUED.

legacies, from lapse of time.—After the lapse of twenty years from the time when an executor or administrator may be cited to a final settlement, a final settlement of the estate, and the payment of the legacies or distributive shares, will be presumed; and a court of equity will not, in the absence of peculiar circumstances, entertain a bill to compel a settlement and distribution after that time.—*Worley v. High's Adm'r*..... 171

II. PLEADINGS AND PRACTICE.

16. *Who are necessary parties to bill.*—Where a bill seeks the specific performance of a contract relating to real estate, and a divestiture of the legal title which was in a decedent, his heirs-at-law are necessary parties to the bill.—*Moore v. Murrah*..... 573
17. *When assignor and assignee may join in bill.*—Where lands are sold under mortgage, and are found to be subject to a former vendor's lien outstanding against the mortgagor's vendor; and thereupon the purchaser at the sale, in consideration of being released from his purchase, conveys by deed, without warranty, to the mortgagee, all his interest in the land, together with all damages resulting to him from the breach of the covenants of warranty running with the land, and all right of action for the same at law or in equity,—he may be joined with the mortgagee, as a nominal plaintiff, in a bill which seeks to enforce the claim for such damages.—*Gunter v. Williams and Wife*..... 561
18. *Alternative averments in bill.*—As the averments in a bill are to be construed most strongly against the plaintiff, alternative averments are insufficient, unless each alternative shows a good cause of action.—*David v. Shepard*..... 587
19. *Certainty requisite in allegations of bill, as to terms of parol contract sought to be enforced.*—In a bill which seeks to enforce a parol contract for the sale of lands, great precision and nicety are required, and the terms of the contract must be averred with distinctness and certainty. Where the bill seeks to enforce, in favor of an assignee, a vendor's lien for the unpaid purchase-money of land, an averment that C., the vendor, "permitted the said M.," the purchaser, "to go into the possession of said land, and to occupy and cultivate the same, without rent or charge, but with the understanding that, when the said M. should become able to do so, he would repay the money so paid by the said C., with the interest thereon, and that the said C. would make him a title to said lands,"—does not, of itself, state the contract with sufficient certainty and definiteness to authorize a decree for the plaintiff; but it is sufficient, when construed in connection with the additional averments, that C., being indebted to plaintiff, transferred to him certain claims and demands which he held on M., "in which was included the said sum which M. had agreed with said C. to pay for said tract of land"; that plaintiff accepted the proposition, and M. also consented to it; and that plaintiff, by said transfer, "was substitu-

CHANCERY—CONTINUED.

- ted to all the rights of said C. as vendor, and has a right in equity to foreclose her lien upon said tract of land for the purchase-money."—*Magruder v. Campbell*,..... 611
20. *Discretionary matters not revisable on error*.—It is discretionary with the chancellor, in passing on a demurrer for the non-joinder of necessary parties, to order "that a decision on said demurrer stand over, to the end that the plaintiff may apply to amend his bill by adding" the necessary parties; and his action in the premises is not revisable on error or appeal.—*S. C.*..... 611
21. *Same*.—When a cause has been submitted for final decree on pleadings and proof, and held up for decision in vacation or at the next term, the chancellor may, in his discretion, set aside the order of submission at the next term, and restore the cause to the docket, in order that the plaintiff may make application to vacate and set aside a previous order suppressing a deposition; and it is also discretionary with him to set aside the order suppressing the deposition.—*S. C.*..... 611
22. *What is available on error*.—Where the purchaser at an administrator's sale, under an order of the probate court, is joined with the decedent's heirs-at-law, as a defendant to a bill which seeks to enforce an outstanding vendor's lien on the land, he can not complain on error of an irregularity in the appointment of a guardian *ad litem* for an infant heir.—*S. C.*..... 611
23. *Assignment of dower under cross bill, on bill filed to enforce vendor's lien*.—Although the vendor's lien for the unpaid purchase-money of land is superior to the right of the purchaser's widow to dower in the lands; yet she may maintain a cross bill for an assignment of her dower, where the original bill is filed to enforce the vendor's lien, because she is entitled to an account of the rents and profits, and has a right to appropriate them to the discharge of the lien, or to discharge it in any other manner.—*Brooks v. Woods*. 538
24. *Decree on award, without formal pleadings, or supplemental bill*.—When the matters in controversy in a pending chancery suit are submitted to arbitration, and the award is in substantial compliance with the requisitions of the statute, a decree may be entered pursuant to its terms, without a supplemental bill or other formal pleadings.—*Elrod v. Simmons*..... 275
25. *Premature submission of cause on pleadings and proof; dismissal without prejudice*.—When a cause is prematurely submitted on pleadings and proof, service of process not having been perfected on one of the defendants, who is a necessary party to the bill, or the cause not being at issue as to him, the chancellor may set aside the submission, and require the necessary proceedings to be had to bring the cause regularly to a hearing, or he may dismiss the bill; but the dismissal in such case should be without prejudice, if the evidence shows that the plaintiff has a substantial cause of action.—*Wright v. May*..... 550
26. *Same; same*.—When a cause is prematurely submitted, on pleadings and proof, infants who are necessary parties defendants not having been brought before the court, the chancellor may either

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- set aside the submission, and remand the cause to the docket, or he may dismiss the bill; but, if the proof shows that the complainant has any claim to relief, the dismissal should be without prejudice; and if he dismisses the bill on the merits, without noticing the defect, the appellate court will reverse his decree, and render such decree as he ought to have rendered.—*Moore v. Murrah*..... 573
27. *Agreement of record, waiving irregularities*.—An agreement of record, between the counsel of the appellant and appellee, waiving all irregularities, and consenting to try the cause upon the merits of the decree and testimony, will not be allowed the effect of putting the chancellor in error, nor of requiring the appellate court to dispose of the cause on its merits, when it appears that there are infants who are necessary parties, and who were not brought before the court.—*S. C.*..... 573
28. *"Stay-law" not applicable to suit in chancery*.—Suits in chancery are not within the provisions of the first section of the act approved February 20, 1866, entitled "An act to regulate judicial proceedings."—*Ex parte Hewitt*..... 300
29. *Decree under act of 1846, settling property on trustee for married woman; continuance of trustee's title*.—Where a bill in chancery is filed under the provisions of the act approved February 14, 1846, entitled, "An act to protect the rights of married women"; and a decree is therein rendered, by which the wife's distributive interest in a decedent's estate is settled upon a trustee, "for her sole and separate use and support, and for the support and maintenance of her family"; the trust does not terminate on the death of the husband, but continues during the life of the wife. *Parish's Adm'r v. Balkum*..... 285
30. *Decree reversed and rendered*.—The chancellor's decree in this case, granting a specific performance on the allegations of the bill and a decree *pro confesso*, having been reversed on account of the complainant's failure to show that he had done all the law required on his part to entitle him to such decree, the appellate court refused to remand the cause, and rendered a decree dismissing the bill.—*Gentry v. Rogers*..... 442
- CHARGE OF COURT.
1. *Abstract charge*.—A charge which is abstract, is properly refused. *Stephen v. The State*..... 67
Also, *Leslie v. Langham's Executors*..... 524
2. *Charge refused presumed abstract*.—A charge asked and refused will be presumed to be abstract, unless the contrary is affirmatively shown by the record.—*Turbeville v. The State*..... 715
3. *Presumption in favor of affirmative charge*.—An affirmative charge of the court, which, upon any supposable state of facts, would be correct, will be presumed to have been justified by the evidence, unless such presumption is rebutted by the record.—*Tempe v. The State*..... 350
4. *Charge on sufficiency of evidence*.—In an action by the transferee

CHARGE OF COURT—CONTINUED.

- or assignee of a promissory note and open account, the plaintiff's ownership of the cause of action being put in issue by plea verified by affidavit, it is error to instruct the jury, "that if the evidence between the parties was equally balanced, they must find for the plaintiff."—*Jarrell v. Lillie*..... 271
5. *Same*; explanatory charge.—The court having instructed the jury, at the prisoner's request, that they must find him not guilty, "unless the evidence was such as to exclude to a moral certainty every supposition but that of his guilt"; it is not error to add, by way of explanation, "that this only means that they must be satisfied beyond a reasonable doubt of his guilt."—*Turbeville v. The State*..... 715
6. Charge on circumstantial evidence.—A charge to the jury, in these words: "If there is evidence tending to show that the prisoner is guilty of the offense charged in the indictment, and an absence of proof or suspicion of any other guilty agent, the absence of such proof is a circumstance to be considered by the jury as evidence against him,"—is not erroneous.—*Hall v. The State*..... 698

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1. § 640. Selection of attorney to preside as judge.—*Horton v. Pool*..... 629
2. § 977. Physician's diploma as evidence.—*Halliday v. Butt*..... 178
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COMMON CARRIERS.

See BAILMENT, 2.

CONSTITUTIONAL LAW.

1. "An act to regulate judicial proceedings," approved Feb. 20, 1866, as impairing the obligation of contracts, and delaying justice.—The first and eighth sections of the act approved February 20, 1866, entitled "An act to regulate judicial proceedings," (commonly known as the "stay-law,") which postpone the rendition of judgment at

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- least twelve months, are not, in their operation on pre-existing contracts, violative of the constitutional provision against laws impairing the obligation of contracts, nor of the fourteenth section of the bill of rights, which declares that "all courts shall be open," and that right and justice shall "be administered without sale, denial, or delay;" but the second, third, and fourth sections, which prevent the collection of judgments under execution, are unconstitutional and void. (WALKER, C. J., *dissenting* on the first point, held the whole law unconstitutional and void.—*Ex parte Pollard & Woods*..... 77
2. *Same, as affected by constitutional provisions as to title, subject-matter, and form.*—The provision of the fifth section of said act, which prohibits sales by mortgagees without actual possession of the property, not being in any sense a regulation of judicial proceedings, is violative of the second section of the fourth article of the constitution, which requires that the subject-matter of the act "shall be distinctly stated in the title;" but the unconstitutionality of this section does not affect the validity of the other provisions of the act, which are appropriately described in the title; nor is said act, though in effect amendatory of other laws, violative of that provision of said second section of the fourth article of the constitution, which requires that "the law or section revised or amended shall itself be set forth at full length" in the amendatory act.—*S. C.*..... 77
3. *Act of December 15, 1865, "more effectually to prevent the offenses of grand larceny, arson, and burglary."*—The act approved December 15, 1865, entitled "An act the more effectually to prevent the offenses of grand larceny, arson, and burglary," (Session Acts, 1865-6, p. 116,) is not violative of the constitutional provision (art. iv, § 2) which declares, that "each law shall embrace but one subject, which shall be described in the title."—*Miles v. The State*..... 39
4. *Ex-post-facto laws.*—A law which simply provides another alternative punishment for an offense, which is in mitigation of the punishment prescribed by the former law, is not, in its operation on offenses already committed, violative of the constitutional provision against *ex-post-facto* laws.—*Turner v. The State*..... 21
5. *Same.*—The act approved December 5, 1863, providing that section 3600 of the Code, which prohibited a conviction in a criminal case on the uncorroborated testimony of an accomplice, "shall not extend to trials on indictments for misdemeanors," does not apply to prosecutions for misdemeanors committed prior to its passage: to make it apply to such cases would be violative of the constitutional provision against *ex-post-facto* laws. (WALKER, C. J., *dissenting*.)—*Hart v. The State*..... 32
6. *General criminal statutes applicable to freedmen.*—For offenses committed between the 20th July, 1865, (when the provisional governor issued a proclamation, declaring the civil and criminal laws of the State, "as they stood on the 11th day of January, 1861, except that portion which relates to slavery, to be in full force

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- and operation,") and the 22d September, 1865, (when an ordinance was passed by the convention, by which slavery was declared to be abolished and prohibited,) freedmen are amenable to the general criminal statutes applicable to other persons. —
Stephen v. The State..... 67
 Also, *Bill Miller v. The State*..... 54
Tempe v. The State..... 350
7. *Second trial after reversal of former conviction.*—Where a judgment of conviction in a criminal case is reversed, on error or appeal, at the instance of the prisoner, he may be tried again; even where the reversal is on account of the insufficiency of the verdict.—*Turner v. The State*..... 21
 Also, *Waller v. The State*..... 325
8. *Same.*—The law is well settled in this State, that where a judgment of conviction in a criminal case is reversed on error or appeal, at the instance of the prisoner, he thereby waives his constitutional immunity against being placed in jeopardy, and may be tried again; and the fact that he has already suffered a portion of the prescribed term of imprisonment under the former judgment, in consequence of the failure of the court to order a suspension of the sentence pending the proceedings in the appellate court, while it may give him a strong claim to executive clemency, is no bar to another trial.—*Jeffries & Jeffries v. The State*..... 381
9. *County courts, as established by Penal Code.*—The county courts of this State, as established by the Penal Code of 1866, and presided over by the probate judges in their respective counties, are not violative of the 11th section of the 6th article of the constitution, which requires judges of the inferior courts to be elected by the people.—*Balkum v. The State*..... 671
10. *Law prohibiting sale of goods on Sunday, as applicable to Jews.*—A statute, or municipal ordinance, prohibiting the sale of goods by merchants on Sunday, in its application to religious Jews, "who believe that it is their religious duty to abstain from work on Saturday, and to work on all the other six days of the week," is not violative of the 3d section of the 1st article of the State constitution, which declares that no person shall, "upon any pretense whatever, be hurt, molested, or restrained, in his religious sentiments or persuasions."—*Frolickstein v. The State*..... 725
11. *Act approved December 14, 1865, to provide for location of court-house in Dallas county.*—The act approved December 14, 1865, entitled "An act to provide for the location of the court-house in Dallas county," (Session Acts, 1865–6, p. 464,) is not unconstitutional because it was passed without prior consultation with the people of the county, nor because it limits the selection of the county site, at the preliminary election, to a choice between Selma and Cahaba.—*Ex parte Hill*..... 121
12. *State law taxing imported liquors.*—The State has no right to impose a tax for revenue on liquors imported from foreign countries, so long as they remain in the hands of the importer, and in the

CONSTITUTIONAL LAW—CONTINUED.

- original casks or barrels in which they were imported; but the restriction on the State's right to tax ceases, when such liquors pass out of the hands of the importer, or when the original casks are broken by him; and it does not extend to liquors brought here from other States of the Union. (BYRD, J. *dissenting* as to the last proposition.)—*Hinson v. Lott*. 123
13. *Act of congress requiring stamp on process of State courts.*—Congress has not the constitutional power to impose a tax on the process or proceedings of the State courts; consequently, the act of congress approved June 30, 1864, providing for the internal revenue of the government, so far as it requires a stamp to be affixed on legal process issuing from the State courts, is unconstitutional and void. (BYRD, J., holding that said act did not apply to process issued from the State courts.)—*Smith v. Short*. . . . 385
14. *State laws not suspended during late war.*—The State laws, civil and criminal, were not suspended during the late war between the United States and the Confederate States; consequently, a citizen had no right, during that time, to redress his injuries by force, and is criminally responsible for such illegal acts.—*Michael v. The State*. 361
15. *Status of State government during war.*—The existence of this State, as a member of the Federal Union, was not destroyed by the ordinance of secession, nor by its hostile attitude towards the United States during the war: it existed as a government *de facto*, and possessed the powers which pertained to such a government.—*Watson and Wife v. Stone*. 451
16. *Rights of government de facto.*—The legislative acts of a government *de facto*, and acts done under their authority during its existence, are valid, and will be sustained by the courts after the overthrow of such government, notwithstanding their repugnancy to the laws of the rightful government by which it is overthrown.—*S. C.* 451
17. *Investment by guardian in Confederate bonds, and receipt of Confederate money in payment of debts.*—Under the principles of law which are now binding on the judicial tribunals of this State, a guardian who, acting in good faith, under the authority conferred by the act of the legislature approved November 9, 1861, (Session Acts, 1861, p. 53,) received Confederate States treasury-notes in payment of debts due to his ward, and invested his ward's funds in Confederate States bonds, is entitled to credits, on final settlement of his accounts, for the amount of such investments, and for the amount of such funds remaining in his hands at the close of the war.—*S. C.* 451
18. *Receipt of Confederate money by guardian.*—Under the provisions of the act of the legislature, approved on the 9th November, 1861, (Session Acts, 1861, p. 53,) a guardian was authorized, during the war, to receive treasury-notes of the Confederate States in payment of debts due to his ward's estate.—*Neilson v. Cook*. 498
19. *Same.*—The same principles do not apply to a receipt of such treasury-notes by a guardian on the 7th May, 1865, at which time

CONSTITUTIONAL LAW—CONTINUED.

- the government *de facto* in Alabama had been overthrown, and the authority of the United States had been re-established; and there being no legal justification for such receipt, the guardian is chargeable on account of it on final settlement.—*S. C.*..... 498
20. *Receipt of Confederate money by administrator, and investment in Confederate bonds.*—Under the provisions of the act of the legislature approved on the 9th November, 1861, (Session Acts, 1861, p. 53,) an administrator was authorized, during the war, to receive treasury-notes of the Confederate States in payment of debts due the estate; and if he invested such treasury-notes, prior to the expiration of eighteen months from the grant of his letters, in four-per-cent. Confederate bonds, and failed to report such investment to the probate court within the time required by the statute, he is not chargeable on account of the investment, at the instance of distributees or creditors, except on affirmative proof of consequent injury to the estate, and only to the extent of that injury. (BYRD, J., *dissenting*, held that the said act of November 9, 1861, did not authorize an investment in four-per-cent. bonds; that such investment, not being authorized by law, was not ratified by the ordinance of the State convention, No. 26, adopted on the 28th September, 1865; that the administrator was chargeable, at the instance of the distributees or creditors of the estate, with the amount of the funds so invested, as for any other unauthorized conversion of the assets; and that the subsequent act of the legislature, approved on the 23d February, 1866, could not legalize it.—*Dockery v. McDowell*..... 476
21. *Capture of private property on land in time of war.*—The general principle of international law, to which there are admitted exceptions, is now universally acknowledged, that private property on land is exempt from capture and confiscation in war; and this principle was recognized by the government of the United States during the late war, in the published orders of its authorized officials, however much it may have been disregarded or abused in the operations of its armies in the field.—*Hawkins v. Nelson*..... 553
22. *Same; burden of proof.*—Where it appears that the horse in controversy was forcibly taken by the United States army during the war, from the possession of the defendant, to whom it belonged, and who was a non-combatant; was branded as government property, and carried into another county, where it was abandoned, and left on the plaintiff's premises, and was afterwards peaceably regained by the defendant, without the knowledge or consent of the plaintiff; the plaintiff cannot recover in detinue, without showing affirmatively that the capture was authorized by the laws of war, as recognized by the United States government in the published orders of its authorized officials.—*S. C.*..... 553
23. *United States statutes in Alabama in 1864.*—There was no collection district for the United States internal revenue established in this State in 1864, nor were any of the statutes of the United States at that time actually in force in this State.—*Blunt v. Bates*, 470

CONSTITUTIONAL LAW—CONTINUED.

24. *President Lincoln's emancipation proclamation of January, 1863.*
Prior to May, 1865, whether Alabama was in or out of the Union, the emancipation proclamation issued by the president of the United States in January, 1863, had no force here.—*Leslie v. Langham's Executors*..... 524
25. *Abolition of slavery by act of war.*—Slavery was destroyed in Alabama by the act of war, prior to the passage of the ordinance of the State convention on the 22d September, 1865.—*S. C.*..... 524
Also, *Bill Miller v. The State*..... 54
Logan v. The State..... 733
26. *Ratification of judgments by ordinance of State convention, as affecting right of appeal.*—The ordinance of the State convention, No. 26, adopted on the 23th September, 1865, by which judgments and decrees rendered after the 11th day of January, 1861, were ratified, expressly declares that such ratification is "subject to the right of appeal according to law"; and this exception or restriction applies to appeals granted by subsequent statutes, as well as by the statutes then of force.—*Page and Wife v. Matthews' Adm'r.*..... 547
27. *Statute reviving appeals.*—The act of Feb. 21, 1866, (Sess. Acts, 1865-6, p. 64,) in its application to decrees from which appeals were already barred, is not obnoxious to any constitutional objection.—*Page and Wife v. Matthews' Adm'r.*..... 547

CONTEMPT.

See ATTACHMENTS, 1.

CONTRACTS.

1. *Measure of damages for breach.*—The measure of damages for the breach of a special contract, by which plaintiff loaned to defendant a specified quantity of cotton, of a designated quality, and defendant promised, in consideration thereof, to deliver to plaintiff, on a certain future day, the same quantity of cotton, of like quality, is the value of the cotton on the specified day of performance: and this principle is not affected by the fact that no place of delivery is named in the contract, nor by the further fact that the cotton is to be delivered in kind.—*Bozeman v. Rose*..... 212
2. *Parol agreement for discharge of note in Confederate money.*—Where a promissory note, given for the hire of a slave for the year 1865, on its face was payable in money, a parol understanding between the parties, that it might be paid or discharged in Confederate States treasury-notes, can not be received to defeat a recovery on it: the ordinance of the State convention, No. 26, adopted on the 23th September, 1865, does not apply to such case.—*Leslie v. Langham's Executors*..... 524
3. *Acceptance of deed annuls agreement to convey.*—The acceptance by the purchaser of a deed from his vendor, is a complete execution of the vendor's antecedent agreement to convey, and annuls it; and an action at law cannot afterwards be maintained upon the agreement, on account of the deficiency in the land conveyed by the deed.—*Carter v. Beck*..... 599

COSTS.

1. *Judgment for, on abatement.*—On the abatement of an action by the death of the defendant, where no revivor is allowed by statute, judgment for costs can not be rendered against the plaintiff, for the use of the officers of court and witnesses; section 2389 of the Code applies only to cases in which there is a failure to revive through negligence.—*Garrison v. Burden*..... 513
2. *Amendment of judgment.*—When a judgment for costs, against an administrator, is improperly rendered to be levied *de bonis intestatis*, instead of *de bonis propriis*, the error is a mere clerical misprision, which is amendable, and which will be therefore considered as amended.—*Hicks v. Barrett*..... 291
3. *On plea of pardon.*—If the prisoner in a criminal case, after pleading pardon, pleads not guilty, and goes to trial on the latter plea without objection, and the jury return a verdict of guilty against him, it is not error for the court to give judgment for the costs against him.—*Michael v. The State*..... 361

COUNTY COURTS.

1. *Constitutionality of.*—The county courts of this State, as established by the Penal Code of 1866, and presided over by the probate judges in their respective counties, are not violative of the 11th section of the 6th article of the constitution, which requires judges of the inferior courts to be elected by the people.—*Balkum v. The State*..... 671

CRIMINAL LAW.

1. *Calling juror.*—There is no statute, or rule of practice, which requires that when a person, specially summoned as a juror in a case of felony, being called at the clerk's desk, fails to answer to his name, he should also be called at the door of the courthouse, or that an officer should be sent for him; and the refusal of the court to have him thus called or sent for, at the request of the prisoner, is not erroneous.—*Waller v. The State*... 325
2. *Competency and discharge of juror having fixed opinion against capital punishment.*—In a capital case, a juror who states, in answer to a question by the court, that he has a fixed opinion against capital punishment, may be challenged for cause by the State, (Penal Code, § 630,) or may be set aside by the court, *ex mero motu*, although he also states, in answer to questions by the prisoner, "that if he was on the jury, and the law required him to convict, he would do so, notwithstanding the punishment might be capital."—*S. C.*..... 325
3. *Non-residence of persons summoned as jurors, good cause of challenge, but no objection to venire.*—The fact that some of the persons specially summoned as jurors in a capital case are not residents of the county, constitutes a good cause of challenge by either party, (Penal Code, § 628,) but does not give the prisoner a right to have the whole venire set aside.—*Hall v. The State*..... 698
4. *Personal presence of prisoner in court during preliminary proceedings.*—In a case of felony, it is the safer and better practice to

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- have the prisoner personally present in court, when the order is made setting a day for his trial, and prescribing the number of jurors to be summoned.—*S. C.*..... 698
5. *Severance of trial.*—Where several persons are jointly indicted for a felony, they can not claim separate trials as matter of right; but the court may, in its discretion, grant or refuse a severance. *Wade v. The State.*..... 74
6. *Change of venue, on account of incompetency of presiding judge; discontinuance.*—A criminal cause can not be transferred to another county, against the defendant's objection, on the ground that the presiding judge has been of counsel for the prosecution; yet, although such order of transfer is void, if the cause is taken from the docket in consequence of it, and kept off for several years, the prosecution is thereby discontinued.—*Ex parte Rivers.* 712
7. *Former acquittal.*—An acquittal under an indictment for the larceny of goods, is no bar to a subsequent prosecution for obtaining the goods by false pretenses, although the same evidence is adduced by the prosecution in each case.—*Dominick v. The State.*..... 680
8. *Practice in joining issue on pleas of not guilty and former acquittal.* When issue is joined on the pleas of not guilty and former acquittal, it is irregular to submit the two issues to the jury at the same time; but, if the defendant interposes the two pleas together, in a case of misdemeanor, and goes to trial on both at the same time without objection, he thereby waives the irregularity; yet, if the jury find a verdict of not guilty, and fail to pass on the special plea, no judgment can be rendered against the defendant.—*S. C.*..... 680
9. *Plea of pardon.*—If the prisoner in a criminal case, after pleading pardon, pleads not guilty, and goes to trial on the latter plea without objection, and the jury return a verdict of guilty against him, it is not error for the court to give judgment for the costs against him.—*Michael v. The State.*..... 361
10. *Acceptance of pardon.*—A person who was under indictment on the 13th February, 1866, when the governor published his proclamation of amnesty and pardon, and who failed to signify his acceptance of the proffered pardon before the repeal of the law under the authority of which said proclamation was published, cannot now claim the benefit of it.—*S. C.*..... 361
11. *Demurrer to indictment containing good and bad counts.*—The sustaining of a demurrer to a bad count in an indictment, does not affect the remaining good counts, nor relieve the defendant from liability under them.—*Turner v. The State.*..... 21
12. *General verdict of guilty on good and bad counts.*—A general verdict of guilty, under an indictment containing both good and bad counts, will be referred to the good counts, and will support a judgment of conviction.—*Montgomery v. The State.*..... 684
13. *Conviction on testimony of accomplice.*—To authorize a conviction of felony on the testimony of an accomplice, (Penal Code, § 641,) it is not necessary that his testimony should be "corroborated by other evidence in every material part."—*S. C.*..... 684

CRIMINAL LAW—CONTINUED.

14. *Same; ex-post-facto laws.*—The act approved December 5, 1863, providing that section 3600 of the Code, which prohibited a conviction in a criminal case on the uncorroborated testimony of an accomplice, "shall not extend to trials on indictments for misdemeanors", does not apply to prosecutions for misdemeanors committed prior to its passage; to make it apply to such cases would be violative of the constitutional provision against *ex-post-facto* laws. (WALKER, C. J., *dissenting.*)—*Hart v. The State* 32
15. *Ex-post-facto laws.*—A law which simply provides another alternative punishment for an offense, which is in mitigation of the punishment prescribed by the former law, is not, in its operation on offenses already committed, violative of the constitutional provision against *ex-post-facto* laws.—*Turner v. The State*..... 21
16. *General criminal statutes applicable to freedmen.*—For offenses committed by freedmen since the abolition of slavery in this State, they may be indicted, convicted, and punished, under the general criminal statutes applicable to all other persons, although these statutes were not applicable to them while slaves.—*Bill Miller v. The State*..... 54
 Also *Stephen v. The State*..... 67
 Tempe v. The State..... 350
17. *Second trial after reversal of former conviction.*—Where a judgment of conviction in a criminal case is reversed, on error or appeal, at the instance of the prisoner, he may be tried again; even where the reversal is on account of the insufficiency of the verdict.—*Turner v. The State*..... 21
 Also, *Waller v. The State*..... 325
18. *Same.*—In such case, the fact that the prisoner has already suffered a portion of the prescribed term of imprisonment under the former judgment, in consequence of the failure of the court to order a suspension of the sentence pending the proceedings in the appellate court, while it may give him a strong claim to executive clemency, is no bar to another trial.—*Jeffries & Jeffries v. The State*..... 331
19. *Adultery; proof of acts not covered by indictment.*—Under an indictment for living in adultery or fornication, (Code, § 3231,) evidence tending to show criminal conduct between the parties, subsequent to the finding of the indictment, is, *prima facie*, irrelevant; and when offered, its relevancy must be shown by its connection with other evidence already adduced, or its proposal with other relevant evidence afterwards to be adduced.—*Smitherman v. The State*..... 355
20. *Arson in second degree; constituents of offense.*—To constitute the offense of arson in the second degree, by willfully setting fire to or burning "any cotton-house," &c., "which, with the property therein contained, is of the value of five hundred dollars or more," (Penal Code, § 152; Revised Code, § 3698,) it is not sufficient that the fire is applied or communicated to the property in the house: the house itself, or some part thereof, must be burned, within the common-law meaning of the word *burn*.—*Graham v. The State*... 659

CRIMINAL LAW—CONTINUED.

21. *Same; proof of ownership of house; variance.*—Where the house alleged to have been burned is described in the indictment as the property of *Ely Sears*, while the evidence adduced on the trial shows that it belonged to *E. T. Sears*, neither the jury, nor the primary court, nor the appellate court, can presume the identity of the two names, without some proof of the fact. 659
22. *Assault; charge as to constituents of.*—A charge, instructing the jury that, "if the prosecutor gave up his gun to the prisoner, through fear of bodily harm, reasonably excited in his mind by the conduct or manner of the prisoner, then the prisoner might be guilty of an assault," is not erroneous. (*BYRD, J., dissenting*, held, that the charge might have tended to mislead the jury, but, when construed in connection with all the evidence, was not so manifestly erroneous as to justify a reversal on account of it.) *Balkum v. The State*. 671
23. *Assault and battery; conviction of. under indictment for assault with intent to murder.*—Under an indictment for an assault with intent to murder, if the special intent charged is not proved, the defendant may nevertheless be convicted of an assault, or an assault and battery; consequently, a charge to the jury, asserting that they "can not find the defendant guilty" unless the special intent is proved, is properly refused.—*Turbeville v. The State*. 715
24. *Burglary; what constitutes.*—Where the proof showed that the prisoner proposed to a servant a plan for robbing his employer's office by night; that the servant disclosed the plan to his employer, by whom it was communicated to the police; that the master, acting under the instructions of the police, furnished the servant with the keys of his office on the appointed night; that the servant and the prisoner went together to the office, where the servant opened the door with the key, and they both entered through the door, and were arrested in the house by the police,—held, that there could be no conviction of burglary.—*Allen v. The State*. 334
25. *Same; admissibility of confessions and accompanying acts.*—Where the prosecutor testified, that the prisoner, being carried to his house by a policeman, "then and there pointed out to him and said policeman the way he had broken into the house, and acknowledged he had taken said property from there, and that he had entered the house by lifting the door from its hinges;" while another policeman testified, that having arrested the prisoner on suspicion, and finding on his person articles supposed to have been stolen, "he promised that he would be released, if he would go and point out where he had got the property," that the prisoner agreed to do so, and was sent to the prosecutor's house for that purpose; and the court thereupon excluded the confessions from the jury, on motion of the prisoner, "but refused to exclude the acts of the defendant in connection with said confession,"—held, that there was nothing in this action of the court of which the prisoner could complain.—*Mountain v. The State*. 344
26. *Same; sufficiency of verdict.*—Under an indictment for burglary,

CRIMINAL LAW—CONTINUED.

- a verdict in these words, "We, the jury, find the accused guilty of burglary, and find that the offense was committed since the first day of June, 1866, by agreement of counsel," is sufficient. (BYRD, J., *dissenting*.)—*S. C.*..... 344
27. *Murder; what constitutes.*—If a mother intentionally kills her infant child, who is incapable of any resistance, by beating it over the head with an instrument calculated to produce death, the law would imply malice on her part; although it might not imply malice, if the child was capable of taking her life, and was attempting to take it with means adequate to the end, and she killed it to preserve her own life.—*Tempe v. The State.*..... 350
28. *Same; charge as to constituents of.*—A charge, instructing the jury that, "if the deceased was found dead in her bed, with her throat cut, they would be authorized to find the existence of all the legal requisites of murder in the first degree," is erroneous, because it excludes from their consideration the questions, whether the death was the result of suicide, and whether it resulted from a conflict which would reduce the degree of the homicide.—*Hall v. The State.*..... 698
29. *Same; sufficiency of indictment in description of person slain, and as affected by duplicity.*—In an indictment for murder, "an infant child, name to the grand jury unknown", is a sufficient description of the person slain; and it is no objection to the indictment that it describes the child, in different counts, as the infant child of the prisoner, and as an infant child generally, not naming its mother or father; nor that the murder is alleged, in different counts, to have been committed by different means or instruments.—*Tempe v. The State.*..... 350
30. *Same; proof of motive.*—Where a man is indicted for the murder of his wife, proof of a criminal intimacy between him and another woman, at the time of the commission of the offense, is admissible against him.—*Hall v. The State.*..... 698
31. *Same; admissibility of defendant's conduct and declarations as evidence.*—The conduct and declarations of the prisoner, shortly after the commission of the homicide with which he is charged, while they may be competent evidence against him, are not admissible evidence in his favor.—*S. C.*..... 698
32. *Same; admissibility of confessions.*—The prisoner's confessions in this case were held admissible, although they were made to the officer who had him in custody, and was carrying him before an examining court, and who had said to him, "If you know anything about the circumstances, it will be best to tell the truth about it"; and although another officer had previously told him that his supposed accomplice had been arrested and shot, which statement was false, and was made to induce a confession. (BYRD, J., *dissenting*.)—*King v. The State.*..... 314
33. *Same; sufficiency of verdict.*—Under an indictment for murder, a judgment of conviction cannot be rendered on a verdict of guilty which does not find the degree of the crime.—*Hall v. The State.*..... 698
34. *Rape; force, as constituent of.*—To authorize a conviction for

CRIMINAL LAW—CONTINUED.

- rape, it is not necessary that the proof should satisfy the jury that the force used "was such as to create a reasonable apprehension of death" on the part of the female.—*Waller v. The State* 325
35. *Same; penetration and emission.*—Proof of penetration alone is sufficient to sustain an indictment for rape, (Penal Code, § 642,) when the act is shown to have been committed forcibly, and against the consent of the female.—*S. C.*..... 325
36. *Retailing spirituous liquors; election by prosecution.*—In a prosecution for retailing spirituous liquors, the indictment being in the general form authorized by the Code, (§ 1059,) if the first witness on the part of the State is asked by the prosecuting attorney, whether, within the period covered by the indictment, "he had ever obtained liquor from the defendant's store in quantities less than a quart"; and answers, "that he had never bought any liquor there, but that on one occasion, while in said store with others, defendant's wife gave them a drink of liquor, for which he paid no money, nor saw any money paid",—this does not amount to an election on the part of the prosecution to proceed only for violations of the statute in selling in less quantities than a quart.—*Seibert v. The State*..... 60
37. *Same; liability of husband for sale by wife.*—To authorize a conviction of the husband, for the illegal act of the wife in selling spirituous liquors in his store in his absence, the jury must be satisfied from the evidence, beyond a reasonable doubt, that her illegal act was done by his authority; that it was done by her as his clerk or agent, without more, is not enough.—*S. C.*..... 60
38. *Selling liquor drunk on or about premises.*—It being shown in this case that the defendant sold two bottles of whiskey, which the purchaser "carried out into the public road, five or ten steps in front of the defendant's store, and that the liquor was drunk by a crowd of persons, between the store and the road, and in the road;" and the court having thereupon charged the jury, "that it was the defendant's duty, if he sold the whiskey, to prevent it from being drunk on or about his premises, and that if the liquor was drunk, as stated, in front of the defendant's store, and between the store and the road, and in the road, they should find the defendant guilty,"—held, that the charge was correct, although it was also proved that, at the time of the sale, the defendant "told the purchaser that he must carry the whiskey out of his house, and away from his premises," and that the purchaser promised to do so.—*Christian v. The State*..... 376
39. *Same.*—Held, on the authority of the cases of *Brown v. The State*, (31 Ala. 353,) *Easterling v. The State*, (30 Ala. 48,) and *Patterson v. The State*, (36 Ala. 298,) that the defendant's buggy, in which he carried liquor for sale at a public administrator's sale in the country, constituted his premises, within the meaning of the statute, (Code, § 1058,) and that the charge of the court to the jury as to what was necessary to constitute the offense of selling liquor "to be drunk on or about the premises", was correct.—*Pearce v. The State*..... 720

CRIMINAL LAW—CONTINUED.

40. *Same; relevancy of acts not covered by indictment.*—When the evidence adduced by the prosecution, under an indictment for retailing spirituous liquors, tends to prove a sale of spirituous liquor by the defendant at a public administrator's sale in the country, and that the liquor was drunk by the purchaser on or about the premises; proof of another sale of liquor by the defendant, to other persons, at the same public sale, and under similar circumstances, is competent evidence for the prosecution, "to illustrate the character of the first sale, and to show knowledge by the defendant that the liquor sold to the first purchaser was drunk about the premises."—*S. C.*..... 720
41. *Larceny; proof of ownership of stolen property.*—A written receipt, acknowledging payment of the purchase-money for the stolen property by the person who is alleged in the indictment to be the owner, is the first step in the proof necessary to show title or ownership as alleged, and is admissible for that purpose; if the receipt shows that the money was paid by another person, as agent of the alleged owner, parol evidence is admissible to show that the contract was made by the agent, not for himself, but for his principal; and the possession of the receipt by the principal is admissible evidence, as tending to show his ownership of the property..... 372
42. *Same; same.*—Where it was shown that the stolen property was taken from the possession of the person who was alleged in the indictment to be the owner, but the evidence was conflicting as to the character of his possession—some of the evidence tending to show that it belonged to him individually, while there was also evidence which tended to show that he had previously sold it to the Confederate States, and merely held possession as agent or bailee; and the defendant thereupon requested the court to instruct the jury, "that if they were in any doubt whether the property belonged to him or to the government, they must give the defendant the benefit of the doubt, and acquit him;" which charge the court refused to give, without the qualification, "that if he had possession of the property as agent or bailee, they should convict the defendant;"—*held*, that there was no error in the refusal of the charge as asked, nor in the qualification given.—*Bill Miller v. The State.*..... 54
43. *Same; variance.*—Under an indictment against a freedman for the larceny of a mule, alleged to be the property of *J. L. Terrell*, the prisoner's confession, that he had taken "*Mass' Lee's* mule," is not competent evidence, without proof of the identity of *J. L. Terrell* as "*Mass Lee*"; and the admission of such confession is an error which will work a reversal of the judgment, although the bill of exceptions states that the defendant was on trial for the larceny of a mule, "the property of *Lee Terrell*," and no specific objection was made to the evidence on the ground of variance. *Gabriel v. The State.*..... 357
44. *Same; sufficiency of indictment.*—An indictment which, in one count, charges that the defendant "did steal a mule, the personal

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- property of J. L.," and in another count that he "did steal a horse, mare, gelding, colt, filly, or mule, the personal property of J. L.," substantially conforms to the provisions of the Code, and is sufficient..... 357
45. *Same; same*.—In an indictment which charges that the defendants "feloniously took and carried away from a dwelling" certain articles of personal property, the italicized words, if not equivalent to a charge of larceny "in a dwelling house," (Code, § 3170,) nor liable to be rejected as surplusage, are at most mere matter of description, which it may be necessary to prove on the trial, and do not affect the sufficiency of the indictment.—*Moore v. The State*..... 49
46. *Same; sufficiency of verdict*.—Under such an indictment, a verdict finding the defendants "guilty of larceny of the property, as charged in the indictment," and assessing the aggregate value of the stolen property "at fifty dollars in silver and gold," is sufficient to support a judgment of conviction and sentence to three years' imprisonment in the penitentiary.—*S. C.*..... 49
47. *Bringing stolen property into this State; form of indictment*.—An indictment for bringing into this State property stolen elsewhere, (Code, § 3138,) must be framed under the statute which creates the offense: a conviction cannot be had under an indictment in the form prescribed for larceny.—*La Vaul v. The State*... 44
48. *Concealing or receiving stolen property; punishment of*.—For concealing, or aiding to conceal, a stolen horse, or other animal specified in section 3182 of the Code, knowing it to have been stolen, a conviction may be had under section 3178; but, for buying or receiving such stolen animal, knowing it to have been stolen, a conviction can only be had under section 3182.—*Turner v. The State*..... 21
49. *Same*.—The act approved October 7, 1864, which punished horse-stealing, and other offenses therein specified, with death, or ten years' imprisonment in the penitentiary, (Session Acts, 1864, p. 19,) did not repeal section 3178 of the Code, nor affect prosecutions under it.—*S. C.*..... 21
50. *Same*.—Under section 3178 of the Code, and the act amendatory thereof, approved January 23, 1866, (Session Acts, 1865-6, p. 121,) the punishment for concealing, or aiding in the concealment of stolen property, is imprisonment in the penitentiary, "or fine and imprisonment, one or both, at the discretion of the jury"; but, if the jury impose imprisonment as the punishment, or fine and imprisonment, it is the duty of the court to prescribe the period of the imprisonment. (BYRD, J., *dissenting*, held that the said act of January 23, 1866, was meaningless and void.)—*S. C.*..... 21
51. *Same; verdict*.—To sustain a conviction under section 3178 of Code, as amended by said act approved January 23, 1866, the jury must, by their verdict, determine what the punishment shall be.—*S. C.*..... 21
52. *Punishment of horse-stealing; repeal of special by subsequent general statute*.—The act approved October 7, 1864, (Session Acts,

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- 1864, p. 19,) so far as it relates to the punishment of horse-stealing, or larceny of any of the animals therein specially named, is not repealed by the subsequent act, approved December 15, 1865, p. 116,) which provides for the punishment of grand larceny and other offenses therein named : the maxim applies, *Generalia specialibus non derogant*.—*Magruder v. The State*..... 347
53. *Constitutionality of act of December 15, 1865, "more effectually to prevent the offenses of grand larceny, arson, and burglary."*—The act approved December 15, 1865, entitled "An act the more effectually to prevent the crimes of grand larceny, arson, and burglary," (Session Acts, 1865–6, p. 116,) is not violative of the constitutional provision (art. iv, § 2) which declares, that "each law shall embrace but one subject, which shall be described in the title."—*Miles v. The State*..... 39
54. *Same, held applicable only to future offenses*.—The said act of December 15, 1865, applies only to offenses afterwards committed, leaving prior offenses to be punished by the old law.—*S. C.*.... 39
- Also, *Moore v. The State*..... 49
- Bill Miller v. The State*..... 54
- Stephen v. The State*..... 67
- Wade v. The State*..... 74
55. *Proof of venue*.—In a criminal case, if the bill of exceptions purports to set out all the evidence, and does not show that the venue was proved; and an exception was reserved to the conviction and sentence, though no specific charge was given or asked in reference to the proof of venue,—the judgment will be reversed on error on account of the defect in the evidence. (WALKER, C. J., *dissenting*.)—*Frank v. The State*..... 9
56. *Same*.—A charge to the jury, which is stated to have been given "amongst other charges", to the effect "that, if they should find the defendant guilty as charged in the indictment, and that the offense was committed about the 1st November, 1865, then the defendant was liable to punishment under the act of October 7, 1864", is not objectionable as authorizing a conviction without proof of the venue. (BYRD, J., *dissenting*.)—*David v. The State*... 69
57. *Admissibility of confessions*.—Before the confessions of the prisoner, in a criminal case, can go to the jury as evidence, they must be shown to the satisfaction of the court, on consideration of the prisoner's age, condition, situation, and character, and the attendant circumstances, *prima facie* to have been made voluntarily; and the admission of the confessions to the jury, without such preliminary proof to the court, is erroneous.—*Bill Miller v. The State*..... 54
58. *Same*.—The mere fact that a confession is made in answer to a question which assumes the prisoner's guilt, does not, *per se*, render the confession inadmissible.—*S. C.*..... 54
59. *Proof of prisoner's good character; effect of*.—As to the consideration to be given to proof of the prisoner's previous good character, in a criminal case, the correct rule is laid down in the case of *Felix v. The State*, 18 Ala. 720; that is, that such evidence is admis-

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- sible and competent, not only where a doubt exists on the other proof in the case, but even to generate a doubt as to his guilt.
Hall v. The State..... 698
60. *Weight of circumstantial evidence*.—Where circumstantial evidence is such as to produce in the minds of the jury, beyond a reasonable doubt, a conviction of the defendant's guilt, it is as much their duty to find a verdict of guilty, as if the evidence were positive and direct.—*S. C.*..... 698
61. *Personal presence of prisoner in court when sentence is pronounced*. To sustain a judgment and sentence on conviction for a felony, the record must affirmatively show that the prisoner was personally present in court when he was tried, and when sentence was pronounced against him.—*Graham v. The State*..... 659
62. *Verdict; personal presence of prisoner, and amendment of*.—In a case of felony, it is error to allow the verdict of the jury to be received by the clerk, during a recess of the court, in the absence of the prisoner, even though this be done with the consent of his counsel; and it is also error to allow an amendment of the verdict, unless the record affirmatively shows that the prisoner was present in the court at the time.—*Waller v. The State*..... 325
63. *Asking prisoner, on conviction, if he has aught to say in arrest of judgment*.—It is not necessary, in a case of felony, that the record should affirmatively show that the prisoner was asked by the court, before sentence was pronounced on him, if he had anything to say in arrest of judgment; the question will be presumed to have been asked, unless the record affirmatively shows that it was not.—*Robin v. The State*..... 72
64. *Motion in arrest of judgment; presumption in favor of judgment*. When no exception is reserved to the overruling of a motion in arrest of judgment, and the record does not set out the evidence on which the motion was founded, the appellate court will presume that the motion was properly overruled.—*S. C.*..... 72
65. *Presumption in favor of judgment*.—Where the indictment describes the defendant as a freedman, and alleges that the offense was committed before the finding thereof; while the record does not show whether the offense was committed while the defendant was a slave, or after he became free,—the appellate court will presume, when necessary to sustain the judgment of the court below, that the offense was proved to have been committed after the abolition of slavery.—*Tempe v. The State*..... 350
66. *Proviso in repealing criminal statute as to prior offenses*.—The proviso to the 5th section of the "act to establish a new Penal Code", approved the 23d February, 1866, (Session Acts, 1865-6, p. 124,) excepts from the operation of the repealing clause of that section all prosecutions for offenses committed prior to to the day on which said new Penal Code went into operation, (June 1st, 1866,) and leaves such offenses to be punished by the former laws applicable to them.—*S. C.*..... 350
67. *Repeal of criminal statute after sentence, but before its execution*. When the prisoner in a criminal case, having been sentenced to

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- death, is not executed on the day specified in the sentence, and is brought before the court at a subsequent term to be re-sentenced, (Penal Code, § 378,) the repeal of the law under which he was convicted and sentenced, since the original sentence was pronounced, is a sufficient "legal reason against the execution of the sentence," and requires that he should be discharged. (WALKER, C. J., *dissenting.*)—*Aaron v. The State*..... 306
68. *Same; saving clause in repealing statute.*—The proviso to the act adopting the new Penal Code, which provides that nothing contained in the repealing clause "shall affect any prosecution now pending, or which may be hereafter commenced, for any public offense heretofore committed," &c., does not apply to a case in which sentence of death was legally rendered before the day on which the new Penal Code went into effect, and, the sentence not having been executed on the appointed day, the prisoner is brought before the court at a subsequent term, after the repeal of the law under which he was sentenced, to be re-sentenced. *S. C.*..... 306
69. *Judgment reversed, and prisoner discharged.*—Where the record sets out all the evidence connected with the alleged offense, and shows that the prisoner can not be convicted under any indictment, the judgment of conviction will be reversed, (Penal Code, § 765,) and the prisoner ordered to be discharged from custody. *Allen v. The State*..... 334

CUSTOM.

1. *When admissible to vary bill of lading.*—Where the only exception specified in the bill of lading is "dangers of the river", parol evidence can not be received to show a custom among the persons who are engaged in navigating the river, which exempted the owners of the boat from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew. (Overruling *Steele v. McTyer's Adm'r*, 31 Ala. 667.)—*Boon & Co. v. Steamboat Belfast*..... 184

DAMAGES.

1. *Measure of, for breach of contract.*—The measure of damages for the breach of a special contract, by which plaintiff loaned to defendant a specified quantity of cotton, of a designated quality, and defendant promised, in consideration thereof, to deliver to plaintiff, on a certain future day, the same quantity of cotton, of like quality, is the value of the cotton on the specified day of performance: and this principle is not affected by the fact that no place of delivery is named in the contract, nor by the further fact that the cotton is to be delivered in kind.—*Bozeman v. Rose*..... 212
2. *In slander; evidence in aggravation.*—In proving words which are not alleged in the complaint, and which can only be admissible in aggravation of damages, the plaintiff can not prove the sense

DAMAGES—CONTINUED.

in which such words were understood by the hearers, or "the impression made on their minds" by such words, unless the case falls within the principle stated in *Robinson v. Drummond*.—*Bullard v. Lambert*..... 204

DEEDS.

1. *Acceptance of deed annuls agreement to convey*.—The acceptance by the purchaser of a deed from his vendor, is a complete execution of the vendor's antecedent agreement to convey, and annuls it; and an action at law cannot afterwards be maintained upon the agreement, on account of the deficiency in the land conveyed by the deed.—*Carter v. Beck*..... 599
2. *Admissibility of parol evidence to vary*.—Parol evidence is not admissible, at law, to contradict a deed, by showing that it does not in fact convey the number of acres which it purports to convey; consequently, an action of assumpsit, on the common money counts, does not lie to recover the alleged excess of purchase-money paid.—*S. C.*..... 599
3. *Construction of deed as to quantity of land conveyed*.—A deed, executed by an administrator, to the purchaser at a public sale made by him under an order of the probate court, which describes the several parcels composing the tract of land by the numbers of the section and township, stating the number of acres contained in each, and adding the words "*containing in all about*" a specified number of acres, which number is greater than the aggregate of the sums said to be contained in the several parcels: "which said land," it states, "was knocked off to B. for the sum of \$24,457.10,"—shows a sale of the land in gross, and contains no covenant as to quantity.—*S. C.*..... 599
4. *Deed executed by partner in partnership name*.—A deed, or other instrument under seal, executed by one partner in the partnership name, if subsequently ratified by the other partner, is binding on both from its date; and such subsequent ratification may be by parol, and may be proved by parol.—*Gunter v. Williams and Wife*..... 561
5. *Covenants of warranty running with land*.—The covenants of warranty in a deed for land, in the usual form, run with the land; and an action for a breach may be brought in the name of the assignee.—*S. C.*..... 561
6. *What constitutes breach of covenants of warranty*.—If the purchaser yields possession to a paramount title, he may maintain an action for a breach of the covenants of warranty in his deed, though there has been no ouster by action at law.—*S. C.*..... 561
7. *Proof of ancient deed*.—A deed, more than thirty years old, and unblemished by alterations, is admissible in evidence without proof of execution, the subscribing witnesses being presumed to be dead; and its admissibility does not depend on the sufficiency of the certificate of its acknowledgment.—*White v. Hutchings*.... 253
8. *Presumption of proof or acknowledgment of deed from lapse of time; admissibility of record copy*.—After the lapse of twenty years, it

DEEDS—CONTINUED.

will be presumed that a deed, which is shown to have been recorded in the proper office, and in the proper county, was legally proved or acknowledged, and that the proper certificate of its proof or acknowledgment was written on or under it; and a transcript from the record, in such case, will be admissible evidence, (Code, § 1275,) when the facts in proof raise the presumption that the original deed, if not lost or destroyed, is not in the custody, or under the control, of the party who offers the evidence. (*Per JUDGE, J.*)—*S. C.*..... 253

DEPOSITION.

1. *Objection on account of insufficient answers to cross-interrogatories.* A deposition will not be suppressed on motion, on account of the failure of the witness to answer a cross-interrogatory in the appropriate place, when other portions of the deposition contain a substantial answer to the question; nor on account of the want of fullness of the answers, when they are substantially responsive and sufficient, and there is nothing in the deposition to justify the conclusion, that the witness was seeking to evade a disclosure of facts within his knowledge; nor on account of the failure to answer a question which is not pertinent to the issue; nor where the answer, if made, could not have affected the result of the case.—*Bullard v. Lambert*..... 204

DISCONTINUANCE.

1. *What constitutes.*—A criminal cause cannot be transferred to another county, against the defendant's objection, on the ground that the presiding judge has been of counsel for the prosecution; yet, although such order of transfer is void, if the cause is taken from the docket in consequence of it, and kept off for several years, the prosecution is thereby discontinued.—*Ex parte Rivers*. 712
2. *Same.*—Where the principal and his bail are both in court, to answer a *scire facias* on a judgment *nisi*, and the judgment *nisi* is set aside as to the principal, on his plea of pardon, the proceeding against the bail is thereby discontinued, and he is discharged.—*Hatch v. The State*..... 718

DIVORCE.

1. *Second marriage of guilty defendant in divorce suit.*—A statutory prohibition of subsequent marriage by the guilty defendant in a divorce case, has no extra-territorial operation, and does not affect the validity of a subsequent marriage in another State. *Fuller's Adm'r v. Fuller*..... 301

DOWER.

1. *Jurisdiction of equity to assign.*—The rule is settled, that courts of equity will, in all cases, entertain concurrent jurisdiction with courts of law in the assignment of dower.—*Brooks v. Woods*.... 538
2. *Assignment of dower under cross bill, on bill filed to enforce vendor's lien.*—Although the vendor's lien for the unpaid purchase-money

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of land is superior to the right of the purchaser's widow to dower in the lands; yet she may maintain a cross bill for an assignment of her dower, where the original bill is filed to enforce the vendor's lien, because she is entitled to an account of the rents and profits, and has a right to appropriate them to the discharge of the lien, or to discharge it in any other manner.—*S. C.*..... 538

3. *Vendor's lien paramount to.*—Where the purchaser gives his notes, without security, for the agreed price of the land, and the vendor conveys the title to him by deed, the vendor's lien on the land for the unpaid purchase-money is superior to the right of dower on the part of the purchaser's widow.—*S. C.*..... 538

ENTRY AND DETAINER—FORCIBLE AND UNLAWFUL.

1. *Sufficiency of complaint.*—A complaint which alleges that, on a specified day, the plaintiff "was lawfully seized and possessed" of certain premises, and that, "being so seized, on the day aforesaid, the defendant did enter on and take possession of said premises, although notified by plaintiff not to enter," does not show a cause of action, either for a forcible entry, or for an unlawful detainer. *Ferguson v. Carter*..... 607
2. *Same.*—A complaint which alleges that, on a specified day, "plaintiff was lawfully seized and actually possessed of" certain premises, and that defendant, "while said plaintiff was lawfully seized and in actual possession of said premises, with force and strong hand entered upon said premises unlawfully, and, after demand of possession thereof, detained, and does still detain the same, with force and arms,"—is good and sufficient.—*S. C.*..... 607
3. *Statute of limitations as defense to action.*—The statute of limitations of three years, if available as a defense to an action for a forcible entry and detainer, must be taken advantage of by plea, and is not good matter for demurrer to the complaint.—*S. C.* 607
4. *Supersedeas of writ of restitution.*—In an action of unlawful detainer, judgment being rendered in the circuit court in favor of the plaintiff, and a writ of restitution awarded, there is no statute which either requires or authorizes the clerk, when an appeal is taken from that judgment, to supersede the writ of restitution; nor does an appeal bond, the penalty of which is double the amount of the costs, operate as a *supersedeas* of such writ. *Ex parte Floyd*..... 116

ERROR AND APPEAL.

I. WHEN APPEAL LIES.

1. *From order refusing to revoke letters of administration.*—Under the act approved December 12, 1857, entitled "An act to regulate appeals from probate courts", (Session Acts, 1857–8, p. 244,) an appeal lies from an order or decree of the probate court, refusing and dismissing an application for the revocation of letters of administration.—*Clemens v. Walker & Brickell*..... 189
2. *From refusal to revoke apprenticeship.*—An appeal does not lie from an order of the probate court, dismissing and refusing an applica-

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- tion for the revocation of letters of apprenticeship granted by itself under section 1215 of the Code.—*Cox v. Jones*..... 297
3. *From void judgment for costs*.—A judgment for costs against the plaintiff, for the use of the officers of court and witnesses, where the suit has abated by the death of the defendant, being a nullity, will not support an appeal.—*Garrison v. Burden*..... 513
4. *From decree dismissing cross bill*.—Where a bill is filed to enforce a vendor's lien for the unpaid purchase-money of land, against the widow, personal representative, and heirs-at law of the deceased purchaser, and the widow files a cross bill for an assignment of her dower in the lands, an appeal lies from a decree dismissing her cross bill.—*Brooks v. Woods*..... 538
5. *From judgment on petition for re-hearing at law*.—By the long and unquestioned practice of this court, an appeal lies from a judgment granting a rehearing or new trial (Code, §§ 2403, *et seq.*) after final judgment.—*Dothard v. Teague*..... 583

II. LIMITATION.

6. *Under act approved Feb. 21, 1866*.—The act approved February 21, 1866, entitled "An act to regulate appeals from the probate court", (Session Acts, 1865-6, p. 24,) applies to decrees from which appeals were already barred at the passage of the act: and this application of the statute is not obnoxious to any constitutional objection, as taking away or impairing vested rights.—*Page and Wife v. Matthews' Adm'r*..... 547
- Also, *Noles' Heirs v. Noles' Adm'rs*..... 576
7. *As affected by ratifying ordinance of State convention*.—The ordinance of the State convention, No. 26, adopted on the 28th September, 1865, by which judgments and decrees rendered after the 11th day of January, 1861, were ratified, expressly declares that such ratification is "subject to the right of appeal according to law"; and this exception or restriction applies to appeals granted by subsequent statutes, as well as by the statutes then of force. *Page and Wife v. Matthews' Adm'r*..... 547

III. PRACTICE.

8. *Parties to appeal, and security for costs*.—From a final decree of the probate court against A. H., a *non compos mentis*, to be levied of the goods and chattels, &c. of the said A. H. in the hands of his guardian, W. B. M., an appeal may be prosecuted "by W. B. M. as guardian of A. H."; and if the clerk's certificate states "that the said W. B. M. gave A. B. as security for the costs of said appeal," this is a substantial compliance with the requisitions of the statute.—*Modawell v. Holmes*..... 391
9. *Joinder in error*.—A joinder in error by the appellee is a waiver of all objections to the form of the appeal or the assignments of error.—*Magruder v. Campbell*..... 611
10. *Cross assignments of error*.—The appellee will not be allowed, even with the consent of the appellant, to make cross assignments of error, unless he reserved a bill of exceptions to the rul-

ERROR AND APPEAL—CONTINUED.

- ings of the court below; and it is not sufficient that his exceptions are stated in the appellant's bill.—*Leslie v. Langham's Executors*. 524
11. *Agreement of record, waiving irregularities*.—An agreement of record, between the counsel of the appellant and appellee, waiving all irregularities, and consenting to try the cause upon the merits of the decree and testimony, will not be allowed the effect of putting the chancellor in error, nor of requiring the appellate court to dispose of the cause on its merits, when it appears that there are infants who are necessary parties, and who were not brought before the court.—*Moore v. Murrah*. 573
12. *What is revisable*.—It is discretionary with the chancellor, in passing on a demurrer for the non-joinder of necessary parties, to order "that a decision on said demurrer stand over, to the end that the plaintiff may apply to amend his bill by adding" the necessary parties; and his action in the premises is not revisable on error or appeal.—*Magruder v. Campbell*. 611
13. *Same*.—When a cause has been submitted for final decree on pleadings and proof, and held up for decision in vacation, or at the next term, the chancellor may, in his discretion, set aside the order of submission at the next term, and restore the cause to the docket, in order that the plaintiff may make application to vacate and set aside a previous order suppressing a deposition; and it is also discretionary with him to set aside the order suppressing the deposition.—*S. C.* 611
14. *Same*.—Where the witnesses for the prosecution, in a criminal case, are put under the rule, and one of them nevertheless remains in court during the examination of another, it is discretionary with the court to permit him to be examined; and the exercise of that discretion is not revisable on error.—*Montgomery v. The State*. 684
15. *What is available on error*.—Where the purchaser at an administrator's sale, under an order of the probate court, is joined with the decedent's heirs-at-law, as a defendant to a bill which seeks to enforce an outstanding vendor's lien on the land, he can not complain on error of an irregularity in the appointment of a guardian *ad litem* for an infant heir.—*Magruder v. Campbell*. 611
16. *Same*.—On appeal from a decree rendered on the final settlement of an administrator's accounts and vouchers, errors can not be assigned on an order, made at a previous term, confirming his report of a sale of the land.—*Forrester v. Forrester's Adm'r*. 557
17. *Presumption in favor of judgment*.—In a probate case, where there is no bill of exceptions, and the evidence which was before the court is not set out in the decree, if the record shows that the court had jurisdiction of the subject-matter and parties, the appellate court will presume that its decision on a question of fact was justified by the evidence.—*S. C.* 557
18. *Same*.—When a demurrer has been sustained by the primary court, the appellate court will presume, unless the record affirmatively shows the contrary, that causes of demurrer were specified as required by the statute, (Code, § 2253,) and, if the pleading

ERROR AND APPEAL.—CONTINUED.

- to which the demurrer was sustained is defective, will presume that the demurrer was sustained on account of that defect.—*Whitten and Wife v. Graves*..... 578
19. *Same*.—When a decree is rendered *nunc pro tunc*, as on final settlement of a guardian's accounts, which recites that "it appeared to the satisfaction of the court, from the records of the court, and from the papers on file relating to the settlement", &c., while the contents of the records and papers are not set out, the appellate court will presume that they authorized the decree which was rendered.—*S. C.*..... 578
20. *Same*.—Where the bill of exceptions does not purport to contain all the evidence that was introduced on the trial, an affirmative charge will be presumed to have been justified by the evidence, unless the evidence which is set out shows that it is erroneous. *Leslie v. Langham's Executors*..... 524
Also, *Tempe v. The State*..... 350
21. *Same*.—Where the bill of exceptions purports to set out all the evidence that was introduced in the court below, the appellate court will only make such intendments or presumptions in favor of the judgment, as might have been made by the court below, or by the jury under its instructions, on the facts stated.—*Blunt v. Bates*..... 470
22. *Same*.—Where the indictment describes the defendant as a freedman, and alleges that the offense was committed before the finding thereof; while the record does not show whether the offense was committed while the defendant was a slave, or after he became free,—the appellate court will presume, when necessary to sustain the judgment of the court below, that the offense was proved to have been committed after the abolition of slavery.—*Tempe v. The State*..... 350
23. *Same*.—When a pending chancery suit is submitted to arbitration, and the record shows that the award was read to the court, and that a decree was thereon rendered, but the submission and award are not set out, the appellate court will presume that the decree was authorized by the proceedings under the arbitration. *Elrod v. Simmons*..... 275
24. *Same*.—When no exception is reserved to the overruling of a motion in arrest of judgment, and the record does not set out the evidence on which the motion was founded, the appellate court will presume that the motion was properly overruled.—*Robin v. The State*..... 72
25. *Error without injury*.—The admission of irrelevant evidence is not a reversible error, when the record shows that no injury to the appellant resulted from its introduction.—*Mayer v. Clark*.... 259
26. *Same*.—The admission of evidence which is, *prima facie*, irrelevant, and the relevancy of which is not affirmatively shown, will work a reversal of the judgment, unless the record shows that no injury resulted from its admission.—*Smitherman v. The State*..... 356

IV. JUDGMENT.

27. *Judgment reversed, and prisoner discharged*.—Where the record

ERROR AND APPEAL—CONTINUED.

- sets out all the evidence connected with the alleged offense, and shows that the prisoner can not be convicted under any indictment, the judgment of conviction will be reversed, (Penal Code, § 765,) and the prisoner ordered to be discharged from custody. *Allen v. The State*..... 334
28. *Decree reversed and rendered*.—The chancellor's decree in this case, granting a specific performance on the allegations of the bill and a decree *pro confesso*, having been reversed on account of the complainant's failure to show that he had done all the law required on his part to entitle him to such decree, the appellate court refused to remand the cause, and rendered a decree dismissing the bill.—*Gentry v. Rogers*..... 442

ESTATES OF DECEDENTS.

1. *Petition for sale of lands; description of heirs*.—In a petition for the sale of a decedent's real estate, for equitable division among the heirs, (Code, § 1868,) the statute requires that the names and residences of the heirs shall be stated; and an averment that the names of two of the minor heirs, who are shown to reside in the county, "are unknown," is not sufficient to sustain the order of sale on appeal.—*Noles' Heirs v. Noles' Adm'rs*..... 576
2. *Same; notice to heirs*.—To sustain an order for the sale of a decedent's lands for equitable division, the record must affirmatively show that the resident heirs, of full age, had the statutory notice, (Code, § 1869,) or that they appeared.—*Summersett v. Summersett*, 596
3. *Void order vacated at subsequent term*.—A void order of sale may be vacated by the probate court, on application, at a subsequent term.—*S. C.*..... 596
4. *Same*.—The probate court has power, and it is its duty, on a proper application being made, to set aside and vacate, at any time, an order for the sale of a decedent's real estate, which is void on its face, or shown to be void by the matters of record connected with it.—*Johnson v. Johnson's Adm'r*..... 247
5. *Validity of order of sale*.—An order for the sale of a decedent's realty in this case, founded on a petition which alleged that a sale was necessary for the purpose of making an equitable division among the parties interested, held void under the provisions of the act approved February 7, 1854, entitled "An act to regulate the sale of real and personal property by executors and administrators."—(Session Acts, 1853-4, p. 55).—*S. C.*..... 247
6. *Jurisdiction of probate court to allot exempt property*.—Under the general grant of jurisdiction "for orphans' business," the probate court has the authority, under a petition filed by the members of a decedent's family, to allot to them the personal property to which they are entitled under section 1738 of the Code.—*Turner's Adm'r v. Whitten*..... 530
7. *Exemption of property for use of decedent's family*.—On the death of a widow, whose family is composed of an only child, the child is entitled to the benefit of the exemption provided by the statute, (Code, § 1738,) for the family of a decedent.—*S. C.*..... 530

ESTATES OF DECEDENTS—CONTINUED.

8. *Presumption of settlement*.—After the lapse of twenty years from the time when an executor or administrator may be cited to a final settlement, a final settlement of the estate, and the payment of the legacies or distributive shares, will be presumed; and a court of equity will not, in the absence of peculiar circumstances, entertain a bill to compel a settlement and distribution after that time.—*Worley v. High's Adm'r*..... 171
9. *Same*.—After the lapse of twenty years from the time when an executor or administrator may be cited to a final settlement, the presumption of settlement and payment arises in his favor; and this presumption is not rebutted or destroyed by proof of any disability, such as infancy or coverture, on the part of the distributees by whom he is afterwards cited to a settlement.—*McCartney's Adm'r v. Bone and Wife*..... 533

ESTOPPEL.

See CHANCERY, 6, 7.

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *In slander; evidence in aggravation*.—In proving words which are not alleged in the complaint, and which can only be admissible in aggravation of damages, the plaintiff cannot prove the sense in which such words were understood by the hearers, or “the impression made on their minds” by such words unless the case falls within the principle stated in *Robinson v. Drummond*.—*Bullard v. Lambert*..... 204
2. *Trial of right of property; admissibility of claim bond, attachment, and levy, as evidence for plaintiff*.—In a statutory trial of the right of property, between a plaintiff in attachment and a claimant who deduces title from the defendant in attachment, there is no error in admitting the claim bond, in which the levy and claim are recited, “as evidence to prove the levy”; nor in the admission of the attachment and its levy, as evidence for the plaintiff. *Mayer v. Clark*..... 259
3. *Same; evidence identifying goods levied on, and showing consideration of plaintiff's debt*.—In such action, though it may be unnecessary for the plaintiff in attachment to prove the identity of the property levied on, the admission of such evidence, at his instance, is not erroneous; nor is there any error in permitting him to prove the notes on which his suit is founded, or their consideration.—*S. C.*..... 259
4. *Indictment for living in adultery; acts not covered by indictment*.—Under an indictment for living in adultery or fornication, (Code, § 3231,) evidence tending to show criminal conduct between the parties, subsequent to the finding of the indictment, is, *prima facie*, irrelevant; and when offered, its relevancy must be shown by its connection with other evidence already adduced, or its proposal with other relevant evidence afterwards to be adduced.—*Smitherman v. The State*..... 355

EVIDENCE—CONTINUED.

5. *Indictment for retailing spirituous liquors; acts not covered by indictment.*—When the evidence adduced by the prosecution, under an indictment for retailing spirituous liquors, tends to prove a sale of spirituous liquor by the defendant at a public administrator's sale in the country, and that the liquor was drunk by the purchaser on or about the premises; proof of another sale of liquor by the defendant, to other persons, at the same public sale, and under similar circumstances, is competent evidence for the prosecution, "to illustrate the character of the first sale, and to show knowledge by the defendant that the liquor sold to the first purchaser was drunk about the premises."—*Pearce v. The State*. 720
 6. *Indictment for murder; proof of motive.*—Where a man is indicted for the murder of his wife, proof of a criminal intimacy between him and another woman, at the time of the commission of the offense, is admissible against him.—*Hall v. The State*. 698
 7. *Indictment for receiving stolen goods; proof of ownership of stolen property.*—A written receipt, acknowledging payment of the purchase-money for the stolen property by the person who is alleged in the indictment to be the owner, is the first step in the proof necessary to show title or ownership as alleged, and is admissible for that purpose; if the receipt shows that the money was paid by another person, as agent of the alleged owner, parol evidence is admissible to show that the contract was made by the agent, not for himself, but for his principal; and the possession of the receipt by the principal is admissible evidence, as tending to show his ownership of the property.—*Oakley v. The State*. 372
- II. ADMISSIONS, CONFESSIONS, DECLARATIONS, &C.
8. *Slander; plaintiff's declarations, as tending to show want of chastity.* The declarations of the female plaintiff, in an altercation between herself and her husband, in reference to her mother-in-law's statements concerning her unchaste conduct as reported and imputed to her by the alleged slanderous words, are competent evidence for the defendant, under the plea of justification, as bearing on the question of her chastity and modesty.—*Bullard and Wife v. Lambert*. 204
 9. *Admissibility of mortgagor's acts or declarations as evidence against mortgagee.*—Where the claimant deduces title under a mortgage or conditional conveyance from the defendant in attachment, the fact that the defendant, after the execution of said mortgage, but before the levy of the attachment, and while he was in possession of the property conveyed, sold a portion of it in the absence of the claimant, is competent evidence for the attaching creditor, as explanatory of the defendant's possession, but not for the purpose of impeaching the *bona fides* of the conveyance to the claimant.—*Mayer v. Clark*. 259
 10. *Original entries on physician's books; admissibility and proof.*—In an action to recover for medical services rendered by plaintiff as a physician, section 2298 of the Code makes the original entries on his books "evidence for him that the services were rendered",

EVIDENCE—CONTINUED.

- unless their correctness is denied on oath by the defendant in open court; but such entries must nevertheless be identified by competent testimony, and cannot be proved by the plaintiff's own oath.—*Halliday v. Butt*..... 178
11. *Same*.—In such case, preliminary proof of the identity of the entries must first be made to the court; and if the court decides that they are, *prima facie*, admissible, they must then go to the jury as evidence, unless the defendant denies their truth in the mode prescribed by the statute. Proof of hand writing, *it seems*, is, *prima facie*, sufficient proof of identity.—*S. C.*..... 178
12. *Confessions in criminal case*.—Before the confessions of the prisoner, in a criminal case, can go to the jury as evidence, they must be shown to the satisfaction of the court, on consideration of the prisoner's age, condition, situation, and character, and the attendant circumstances, *prima facie*, to have been made voluntarily; and the admission of the confessions to the jury, without such preliminary proof to the court, is erroneous.—*Bill Miller v. The State*..... 54
13. *Same*.—The mere fact that a confession is made in answer to a question which assumes the prisoner's guilt, does not, *per se*, render the confession inadmissible.—*S. C.*..... 54
14. *Same*.—The prisoner's confessions in this case were held admissible, although they were made to the officer who had him in custody, and was carrying him before an examining court, and who had said to him, "If you know anything about the circumstances, it will be best to tell the truth about it"; and although another officer had previously told him that his supposed accomplice had been arrested and shot, which statement was false, and was made to induce a confession. (*BYRD, J., dissenting.*)—*King v. The State*..... 314
15. *Same; admissibility of confessions and accompanying acts*.—Where the prosecutor testified, that the prisoner, being carried to his house by a policeman, "then and there pointed out to him and said policeman the way he had broken into the house, and acknowledged he had taken said property from there, and that he had entered the house by lifting the door from its hinges;" while another policeman testified, that having arrested the prisoner on suspicion, and finding on his person articles supposed to have been stolen, "he promised that he would be released, if he would go and point out where he had got the property," that the prisoner agreed to do so, and was sent to the prosecutor's house for that purpose; and the court thereupon excluded the confessions from the jury, on motion of the prisoner, "but refused to exclude the acts of the defendant in connection with said confession,"—*held*, that there was nothing in this action of the court of which the prisoner could complain.—*Mountain v. The State*..... 344
16. *Same; admissibility of defendant's conduct and declarations as evidence*.—The conduct and declarations of the prisoner, shortly after the commission of the homicide with which he is charged, while they may be competent evidence against him, are not admissible evidence in his favor.—*Hall v. The State*..... 698

EVIDENCE—CONTINUED.

III. BURDEN, WEIGHT, AND SUFFICIENCY.

17. *Detinue for horse; burden of proof.*—Where it appears that the horse in controversy was forcibly taken by the United States army during the war, from the possession of the defendant, to whom it belonged, and who was a non-combatant; was branded as government property, and carried into another county, where it was abandoned, and left on the plaintiff's premises, and was afterwards peaceably regained by the defendant, without the knowledge or consent of the plaintiff: the plaintiff can not recover in detinue, without showing affirmatively that the capture was authorized by the laws of war, as recognized by the United States government in the published orders of its authorized officials.—*Hawkins v. Nelson*..... 553
18. *Action on note; proof of ownership.*—The rule of practice adopted at the January term, 1853, which provides, that, in an action "by any transferee, assignee, or endorsee, the plaintiff shall not be required to prove his interest in the cause of action, unless the same is put in issue by plea verified by affidavit," does not change any rule of evidence, nor relieve the plaintiff, when such sworn plea is filed, from the necessity of proving his cause of action as before.—*Jarrell v. Lillie*..... 271
19. *Same.*—Possession is *prima-facie* evidence of ownership; but possession of a note by an attorney, as such, is not sufficient to authorize a recovery by him in his own name.—*S. C.*..... 271
20. *Charge on sufficiency of evidence.*—In an action by the transferee or assignee of a promissory note and open account, the plaintiff's ownership of the cause of action being put in issue by plea verified by affidavit, it is error to instruct the jury, "that if the evidence between the parties was equally balanced, they must find for the plaintiff."—*S. C.*..... 271
21. *Same.*—The court having instructed the jury, at the prisoner's request, that they must find him not guilty, "unless the evidence was such as to exclude to a moral certainty every supposition but that of his guilt"; it is not error to add, by way of explanation, "that this only means that they must be satisfied beyond a reasonable doubt of his guilt."—*Turbeville v. The State*..... 715
22. *Charge on circumstantial evidence.*—A charge to the jury, in these words: "If there is evidence tending to show that the prisoner is guilty of the offense charged in the indictment, and an absence of proof or suspicion of any other guilty agent, the absence of such proof is a circumstance to be considered by the jury as evidence against him,"—is not erroneous.—*Hall v. The State*..... 698
23. *Weight of circumstantial evidence.*—Where circumstantial evidence is such as to produce in the minds of the jury, beyond a reasonable doubt, a conviction of the defendant's guilt, it is as much their duty to find a verdict of guilty, as if the evidence were positive and direct.—*Hall v. The State*..... 698
24. *Proof of prisoner's good character; effect of.*—As to the consideration to be given to proof of the prisoner's previous good character,

EVIDENCE—CONTINUED.

in a criminal case, the correct rule is laid down in the case of *Felix v. The State*, 18 Ala. 720; that is, that such evidence is admissible and competent, not only where a doubt exists on the other proof in the case, but even to generate a doubt as to his guilt. *Hall v. The State*..... 698

IV. MATTERS JUDICIALLY KNOWN.

25. *Public currency*.—The appellate court cannot take judicial notice of the extent of the depreciation of the currency during the late war.—*Modawell v. Holmes*..... 391

V. OBJECTIONS.

26. *General objection*.—An objection to evidence, a part of which is not obnoxious to the objection, may be overruled entirely.—*Bullard v. Lambert*..... 204

27. *Same*.—A general objection, not specifying any particular ground, is sufficient to exclude evidence which, as applied to the pleadings in the cause, is illegal on its face; as in a case of variance.—*Gabriel v. The State* 357

28. *Admission of irrelevant evidence*.—The admission of evidence which is, *prima facie*, irrelevant, and the relevancy of which is not affirmatively shown, will work a reversal of the judgment, unless the record shows that no injury resulted from its admission.—*Smitherman v. The State*..... 355

29. *Same*.—The admission of irrelevant evidence is not a reversible error, when the record shows that no injury to the appellant resulted from its introduction.—*Mayer v. Clark*..... 259

VI. PAROL AND WRITTEN.

30. *Admissibility of parol to vary writing*.—Where a contract for the sale of lands is reduced to writing, and is plain and unambiguous in its terms, the subsequent declarations or admissions of the purchaser, as to the estate or interest purchased by him, can not be received to vary or contradict the writing.—*Phillips v. Costley*. 486

31. *Same, to vary deed*.—Parol evidence is not admissible, at law, to contradict a deed, by showing that it does not in fact convey the number of acres it purports to convey; consequently, an action of assumpsit, on the common money counts, does not lie to recover the alleged excess of the purchase-money paid.—*Carter v. Beck*.. 599

32. *Same, in aid of award*.—It is not indispensable to the sufficiency of a statutory award, (Code, §§ 2710-21,) that it should show on its face that the arbitrators were sworn, and that the parties had notice; but these facts may be proved by parol, on motion to enter up the award as the judgment of the circuit court.—*Crook v. Chambers*..... 239

33. *Same, to vary bill of lading*.—Where the only exception specified in the bill of lading is "dangers of the river," parol evidence can not be received to show a custom among the persons who were engaged in navigating the river, which exempted the owners of the boat from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without

EVIDENCE—CONTINUED.

- fault or neglect on the part of the officers or crew. (*Overruling Steele v. McTyer's Adm'r*, 31 Ala. 667.)—*Boon & Co. v. Steamboat Belfast*..... 184
34. *Same, in aid of recognizance*.—Where a recognizance, or undertaking of bail, taken by a justice of the peace, is conditioned for the appearance of the principal at the next term of the circuit court, "to answer any indictment found against him", not specifying or referring to any particular offense, parol evidence cannot be received, in a proceeding by *scire facias* against the bail, to connect the recognizance or undertaking with any particular case.—*The State v. Whitley*..... 728
35. *Same, to explain receipt*.—Where a receipt for the payment of the purchase-money of personal property shows on its face that the money was paid by an agent, parol evidence is admissible to show that the contract was made by the agent, not for himself, but for his principal.—*Oakley v. The State*..... 372

VII. PRIMARY AND SECONDARY.

36. *Proof of sale under decree in chancery*.—A sale of land under a decree in chancery to enforce a vendor's lien, must be proved by the record of the proceedings, or a certified copy thereof, and can not be established by the oral statements of witnesses.—*Phillips v. Costley*..... 486
37. *Proof of ancient deed*.—A deed, more than thirty years old, and unblemished by alterations, is admissible in evidence, without proof of execution, the subscribing witnesses being presumed to be dead; and its admissibility does not depend on the sufficiency of the certificate of its acknowledgment.—*White v. Hutchings*.... 253
38. *Presumption of proof or acknowledgment of deed from lapse of time; admissibility of record copy*.—After the lapse of twenty years, it will be presumed that a deed, which is shown to have been recorded in the proper office, and in the proper county, was legally proved or acknowledged, and that the proper certificate of its proof or acknowledgment was written on or under it; and a transcript from the record, in such case, will be admissible evidence, (Code, § 1275,) when the facts in proof raise the presumption that the original deed, if not lost or destroyed, is not in the custody, or under the control, of the party who offers the evidence. (*Per JUDGE, J.*)—*S. C.*..... 253
39. *Physician's diploma; proof of*.—A diploma, granted by any medical college in the United States, is legal evidence of the right of the person to whom it is granted to practice medicine and surgery, (Code, § 977: Session Acts, 1859-60, p. 20,) without proof of the incorporation of the college by which it was granted; and the loss of the diploma being shown, secondary evidence of its contents may be received.—*Halliday v. Butt*..... 178
40. *Same*.—The loss of a physician's diploma being shown, the testimony of an officer of the medical college by which it was granted would be competent proof of its grant; but the contents of an order on the records of the college, showing the grant of the di-

EVIDENCE—CONTINUED.

ploma, must be proved by an examined copy, and not by the parol testimony of one of the officers.—*S. C.*..... 178

VIII. SUBSTANCE OF ISSUE, AND VARIANCE.

41. *Indictment for larceny; proof of ownership of property.*—Where it was shown that the stolen property was taken from the possession of the person who was alleged in the indictment to be the owner, but the evidence was conflicting as to the character of his possession—some of the evidence tending to show that it belonged to him individually, while there was also evidence which tended to show that he had previously sold it to the Confederate States, and merely held possession as agent or bailee; and the defendant thereupon requested the court to instruct the jury, “that if they were in any doubt whether the property belonged to him or to the government, they must give the defendant the benefit of the doubt, and acquit him;” which charge the court refused to give, without the qualification, “that if he had possession of the property as agent or bailee, they should convict the defendant,”—*held*, that there was no error in the refusal of the charge as asked, nor in the qualification given.—*Bill Miller v. The State.*..... 54
42. *Same; same.*—Under an indictment against a freedman for the larceny of a mule, alleged to be the property of *J. L. Terrell*, the prisoner’s confession, that he had taken “*Mass’ Lee’s* mule,” is not competent evidence, without proof of the identity of *J. L. Terrell* as “*Mass Lee*”; and the admission of such confession is an error which will work a reversal of the judgment, although the bill of exceptions states that the defendant was on trial for the larceny of a mule, “the property of *Lee Terrell*,” and no specific objection was made to the evidence on the ground of variance. *Gabriel v. The State.*..... 357
43. *Arson; proof of ownership of house.*—Where the house alleged to have been burned is described in the indictment as the property of *Ely Sears*, while the evidence adduced on the trial shows that it belonged to *E. T. Sears*, neither the jury, nor the primary court, nor the appellate court, can presume the identity of the two names, without some proof of the fact.—*Graham v. The State.*.... 659

EXECUTORS AND ADMINISTRATORS.

1. *Grant of administration on estate of decedent who resided in another county.*—A grant of letters of administration by the probate court, on the estate of a decedent who resided in another county at the time of his death, is voidable only, and not absolutely void; and a subsequent grant of letters, by the probate court of the proper county, is absolutely void until the revocation of the former letters, and confers on the person appointed no such interest as will entitle him to apply for their revocation.—*Coltart v. Allen.*..... 155
2. *Administration pendente lite.*—If, after the death of a general administrator, who has not fully administered the estate, a contest should arise between persons claiming the right to administer,

EXECUTORS AND ADMINISTRATORS—CONTINUED.

the probate court has power (Code, § 1676,) to appoint an administrator *pendente lite*; but such special administration, *it seems*, should not continue longer than the necessity of the case requires, and should not be allowed to delay or injure the rights of creditors, legatees, or distributees; and if a contest should arise respecting the validity of the decedent's will, which has been admitted to probate, such administrator would not be a proper party to the litigation, but an administrator *de bonis non* should be appointed.—*Clemens v. Walker & Brickell*..... 189

3. *Administration de bonis non*.—On application for the revocation of letters of administration, which are averred in the petition to be “letters of special administration”, but which are nowhere set out in the record, the appellate court will presume, in order to sustain the ruling of the probate court, that they were letters of administration *de bonis non*, if the facts stated in the petition only authorized the grant of such letters.—*3. C.*..... 189

4. *Same*.—An order of the probate court, which purports to be granted on an application “for letters of special administration”; recites that “there has been a vacancy in the office of administration of said estate for more than forty days”, and that no person entitled to administration has applied; and thereupon orders that the said petitioners “be, and are hereby, appointed administrators of said estate, and that proper letters of administration issue to them, authorizing them to collect and preserve the property thereof”,—must be construed, when collaterally assailed in a subsequent application for the grant of administration *de bonis non*, as a grant of letters of administration *de bonis non*, since that is the only kind of grant authorized by the facts stated in the order; and if it further appears that the decedent's will is of record in said probate court, they must administer the estate according to its provisions.—*Clemens v. Wilson*..... 219

5. *Payment of debts by executor or administrator*.—If an executor or administrator pays the debts of the decedent's estate, either with his own funds, or with the funds of the estate, the payment operates an extinguishment of the debts so paid, and entitles him to a credit, on final settlement, for the amount so paid; but he may, for a valid consideration, waive his right to a credit or reimbursement for the moneys so paid, in favor of the distributees of the estate; and in this case, his precedent declarations of his intention to use his own Confederate money in payment of the debts of the estate, for the benefit of the widow and children of the decedent, who was his brother, and his death-bed declarations that he had done so, were held sufficient to show such waiver on his part, and to deprive his personal representative, on final settlement of his administration, of the right to claim a credit for such payments.—*Bates v. Vary*..... 421

6. *Retainer by executor or administrator*.—An executor or administrator, having paid debts as surety for the deceased in his life-time, may retain the amount so paid out of the trust funds which come into his hands, when the estate is solvent; and is entitled

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- to a credit for such payments, on final settlement of his accounts.
S. C...... 421
7. *Statutory action by administrator to recover damages for death of intestate.*—In a statutory action to recover damages for the wrongful act which caused the death of his intestate, (Code, § 1938,) an administrator does not act as the representative of the estate, nor for its benefit; and if he fails in the suit, or recovers less damages than costs, the judgment against him for costs should be *de bonis propriis*, and not *de bonis intestatis*; consequently, the sureties on his administration bond are not liable for his failure to pay such judgment out of the assets of the estate.—*Hicks v. Barrett.*..... 29
8. *Receipt of Confederate money by administrator, and investment in Confederate bonds.*—Under the provisions of the act of the legislature approved on the 9th November, 1861, (Session Acts, 1861, p. 53,) an administrator was authorized, during the war, to receive treasury-notes of the Confederate States in payment of debts due the estate; and if he invested such treasury-notes, prior to the expiration of eighteen months from the grant of his letters, in four-per-cent. Confederate bonds, and failed to report such investment to the probate court within the time required by the statute, he is not chargeable on account of the investment, at the instance of distributees or creditors, except on affirmative proof of consequent injury to the estate, and only to the extent of that injury. (BYRD, J., *dissenting*, held that the said act of November 9, 1861, did not authorize an investment in four-per-cent. bonds; that such investment, not being authorized by law, was not ratified by the ordinance of the State convention, No. 26, adopted on the 28th September, 1865; that the administrator was chargeable, at the instance of the distributees or creditors of the estate, with the amount of the funds so invested, as for any other unauthorized conversion of the assets; and that the subsequent act of the legislature, approved on the 23d February, 1866, could not legalize it.)—*Dockery v. McDowell.*..... 476
9. *Allowance for special or extraordinary services.*—An administrator is not entitled to an allowance for "special or extraordinary services," (Code, § 1825,) on proof that, while in an adjoining county on other business, he made inquiry in relation to the evidence in two suits there pending against the estate, and in relation to the witnesses by whom certain facts could be proved, and had several conversations with his attorney in reference to the suits.
S. C...... 476
10. *Compensation on receipts and disbursements.*—Under the statute regulating an administrator's commissions on receipts and disbursements, (Code, § 1825,) his per-centage on receipts in Confederate money, during the war, should be allowed out of the Confederate money remaining in his hands at the time of the settlement; on disbursements on such funds, during the war, his per-centage should be calculated on the basis of the benefit to the

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- estate by the disbursements; and on receipts and disbursements in United States currency, since the war, the per-centage should be allowed in that currency.—*S. C.*..... 476
11. *Compensation and commissions.*—The refusal of the probate court to allow commissions or compensation to a deceased administrator, on final settlement of his accounts by his personal representative, is, at most, error without injury, when the record shows that he was allowed to retain in his hands, without accounting for, a sum larger than the commissions or compensation to which he would have been entitled.—*Bates v. Vary*..... 421
12. *Allowance of counsel fees.*—To entitle an executor or administrator, on final settlement of his accounts, to a credit for attorney's fees, he must show that he has paid them.—*S. C.*..... 421
13. *Who may contest settlement.*—A creditor of one of the distributees of a decedent's estate has not such an interest in the estate as authorizes him, under section 1812 of the Code, to contest the final settlement of the administrator's accounts and vouchers, *Owens v. Thurmond's Adm'r.*..... 289
14. *Presumption of settlement from lapse of time.*—After the lapse of twenty years from the time when an executor or administrator may be cited to a final settlement, the presumption of settlement and payment arises in his favor; and this presumption is not rebutted or destroyed by proof of any disability, such as infancy or coverture, on the part of the distributees by whom he is afterwards cited to a settlement.—*McCartney's Adm'r v. Bone and Wife*..... 533
15. *Same.*—After the lapse of twenty years from the time when an executor or administrator may be cited to a final settlement, a final settlement of the estate, and the payment of the legacies or distributive shares, will be presumed; and a court of equity will not, in the absence of peculiar circumstances, entertain a bill to compel a settlement and distribution after that time.—*Worley v. High's Adm'r.*..... 117

FRAUD.

1. *Retention of possession by vendor of chattel.*—The retention of possession by the vendor of a chattel, if unexplained, is *prima-facie* evidence of fraud; but, if explained, and shown to be consistent with good faith, the title passes by the contract notwithstanding such retention of possession.—*Mayer v. Clark.*..... 259

GARNISHMENT.

1. *Lien destroyed by decree of insolvency.*—If the defendant in a pending suit dies, and his estate is regularly declared insolvent, before the rendition of judgment, the lien acquired by the previous service of a garnishment is thereby destroyed, and no judgment can be rendered against the garnishee. (BYRD, J., *dissenting.*) *McEachin v. Reid.*..... 410

GIFT.

1. *Delivery essential to parol.*—Delivery, actual or constructive, is necessary to perfect a parol gift of a chattel, or of a chose in action; and where the delivery is constructive merely, the donor's intention to part with the title and dominion of the subject of the gift, in favor of the donee, must be clearly manifested.—*Bates v. Vary*..... 421

GUARDIAN AND WARD.

1. *Investment by guardian in Confederate bonds, and receipt of Confederate money in payment of debts.*—Under the principles of law which are now binding on the judicial tribunals of this State, a guardian who, acting in good faith, under the authority conferred by the act of the legislature approved November 9, 1861, (Session Acts, 1861, p. 53,) received Confederate States treasury-notes in payment of debts due to his ward, and invested his ward's funds in Confederate States bonds, is entitled to credits, on final settlement of his accounts, for the amount of such investments, and for the amount of such funds remaining in his hands at the close of the war.—*Watson and Wife v. Stone*..... 451
2. *Receipt of Confederate money by guardian.*—Under the provisions of the act of the legislature, approved on the 9th November, 1861, (Session Acts, 1861, p. 53,) a guardian was authorized, during the war, to receive treasury-notes of the Confederate States in payment of debts due to his ward's estate.—*Neilson v. Cook*..... 498
3. *Same.*—The same principles do not apply to a receipt of such treasury-notes by a guardian on the 7th May, 1865, at which time the government *de facto* in Alabama had been overthrown, and the authority of the United States had been re-established; and there being no legal justification for such receipt, the guardian is chargeable on account of it on final settlement.—*S. C.*..... 498
4. *Exchange of bank-bills for Confederate money.*—A guardian being authorized to exchange one kind of currency for another, and being justified in yielding obedience, during the war, to the government *de facto* which existed in the State, and in dealing in Confederate States treasury-notes, which constituted the common currency of the country at that time; to make him liable on account of an exchange of bank-bills for such treasury-notes, it must be shown that he acted as a prudent man would not have acted in the management of his own affairs, and that his ward's estate was thereby injured; and he is only liable to the extent of that injury.—*S. C.*..... 498
5. *Liability for hire of slaves.*—The failure of a guardian, in hiring out his ward's slaves, to require a note with sureties from the hirer, being contrary to the general usage, and also violative of section 1751 of the Code, (if that section is applicable to guardians,) he is chargeable with the amount of the hire, on final settlement of his accounts, if it appears that there is danger of loss to the estate on account of the debts; but there is no warrant in the law for decreeing that the guardian "shall stand as security for the debts."—*S. C.*..... 498

GUARDIAN AND WARD—CONTINUED.

6. *Compensation, and how determined.*—Neither the failure to make annual settlements of his accounts, nor mere negligence which works no injury to the ward's estate, where *mala fides* is not shown, is sufficient to deprive a guardian of the right to compensation; but, where no special or extraordinary services are shown, the court is limited, in making the allowance, to the percentage specified in the statute, (Code, §§ 1825, 2039,) and can not be governed by the testimony of witnesses as to the value of the services.—*S. C.*..... 498
7. *Allowance of attorney's fee.*—*Held*, on the authority of the case of *Anderson v. Anderson*, (37 Ala. 683,) that there was no objection to the allowance of an attorney's fee of one hundred and fifty dollars to the guardian in this case; many of the contested items in his account being decided in his favor.—*S. C.*..... 498
8. *Same.*—To entitle a guardian, on final settlement of his accounts, to an allowance for counsel fees, he must show that he has already paid them.—*Modawell v. Holmes*..... 392
9. *Non compos mentis guardian; settlement of accounts of.*—If a guardian becomes *non compos mentis* without having settled his accounts, the probate court may compel or allow a settlement of his accounts by his guardian; the proceedings being conducted in the name of the *non compos* guardian, by his guardian, and the decree for any balance against him being rendered against him individually, to be levied of his goods and chattels in the hands of his guardian.—*S. C.*..... 392
10. *Conclusiveness of final decree.*—A decree of the probate court, rendered on final settlement of an administrator's accounts and vouchers, is conclusive until reversed; and if the administrator is also the guardian of the sole minor distributee of the estate, he can not be charged, in a subsequent settlement of his accounts as guardian, with the value of assets which were not accounted for on his settlement as administrator, although the other distributee appears in open court, and releases all his interest to the said minor.—*S. C.*..... 392
11. *Construction and validity of decree on final settlement of guardian's accounts.*—When a decree of the probate court, rendered on final settlement of a guardian's accounts, shows on its face that the guardian has delivered to the ward's husband all the property which came to his hands, its validity is not affected by an additional order that he retain the balance found due him "out of any assets in his hands"; such order has no other force or effect than a certificate of the balance due him.—*Whitten and Wife v. Graves*, 578
12. *Parties to proceedings; when husband and wife must join.*—A petition, filed in the probate court, in the name of the husband alone, asking the correction of alleged errors in the final settlement of the accounts and vouchers of his wife's late guardian, is demurrable on account of the non-joinder of the wife.—*S. C.*..... 578

HUSBAND AND WIFE.

1. *Criminal responsibility of husband for illegal acts of wife as agent.*—To authorize a conviction of the husband, for the illegal act of

HUSBAND AND WIFE—CONTINUED.

- the wife in selling spirituous liquors in his store in his absence, the jury must be satisfied from the evidence, beyond a reasonable doubt, that her illegal act was done by his authority; that it was done by her as his clerk or agent, without more, is not enough. *Seibert v. The State*..... 60
2. *Sufficiency of complaint, in action against wife, for debt contracted before marriage.*—Under the provisions of the Code, (§ 1981,) the wife is liable for a debt contracted by her before marriage, as if she still were unmarried; and in declaring against her on such debt, it is not necessary to aver that she has a separate estate.—*Zachary v. Cadenhead*..... 236
3. *Liability of husband for debts of wife dum sola.*—Under the provisions of the Code, (§ 1981,) the husband is not liable for debts contracted by the wife before marriage; consequently, in an action against husband and wife, founded on a promissory note which is averred in the complaint to have been executed by the wife *dum sola*, the husband only being served with process, a judgment by default against both of the defendants is erroneous, and will be reversed on a joint assignment of error by them.—*Madden v. Gilmer*..... 637
4. *Separate estate of wife; how charged.*—A married woman, owning a separate estate secured to her by deed, may bind or charge it by any contract, to the same extent as if she were sole and unmarried; and if she joins with her husband and trustee in the execution of a deed for land, her separate estate is bound by the covenants of warranty.—*Gunter v. Williams and Wife*..... 561
5. *Liability of husband for profits of wife's separate estate.*—The husband is not liable for the profits of the wife's statutory separate estate, (Code, § 1983,) although he has used both the income and corpus of the property in partnership business with another person.—*Dent v. Slough*..... 518
6. *Termination of trust by death of husband.*—On the death of the husband, the wife's statutory separate estate is discharged of the trust, and the legal title vests absolutely in her; consequently, she may sue at law for its recovery, and cannot sue in equity without showing some independent ground of equitable relief.—*S. C.* 518
7. *Investment by husband of wife's trust funds in mercantile partnership.* If the husband invests money belonging to the wife's statutory separate estate in a mercantile partnership, his wife's claim against his estate, after his death, is that of a general creditor merely, and cannot be enforced as a trust against the partnership business; nor can she maintain a bill in equity against the surviving partner, for an account of the profits realized after the death of the husband.—*S. C.*..... 518
8. *When wife may come into equity.*—Although the husband is not accountable to the wife for the profits realized from a mercantile partnership, in which he had invested moneys belonging to her statutory separate estate; and although she cannot maintain a bill in equity against his surviving partner, for an account of the profits realized by the partnership business after the death of

HUSBAND AND WIFE—CONTINUED.

- the husband; yet her bill may be maintained as an ordinary bill for discovery and account, if it contains the necessary allegations as to the complication of the accounts, and the necessity of a discovery from the books of the partnership.—*S. C.*..... 518
9. *Chancery decree under act of 1846, settling property on trustee for married woman; continuance of trustee's title.*—Where a bill in chancery is filed under the provisions of the act approved February 14, 1846, entitled, "An act to protect the rights of married women"; and a decree is therein rendered, by which the wife's distributive interest in a decedent's estate is settled upon a trustee, "for her sole and separate use and support, and for the support and maintenance of her family"; the trust does not terminate on the death of the husband, but continues during the life of the wife.—*Parish's Adm'r v. Balkum*..... 285
10. *Who is proper party plaintiff.*—An action of detinue for a slave, who was settled by a decree in chancery under the provisions of the act of 1846, on a trustee, "for the sole and separate use and support" of a married woman, "and for the support and maintenance of her family", and who, after the death of her husband, and her subsequent marriage, went into the possession of her second husband,—should be brought in the name of the trustee, and not in the name of the second husband.—*S. C.*..... 285
11. *Same.*—A petition, filed in the probate court, in the name of the husband alone, asking the correction of alleged errors in the final settlement of the accounts and vouchers of his wife's late guardian, is demurrable on account of the non-joinder of the wife.—*Whitten and Wife v. Graves*..... 578

INSOLVENT ESTATES.

1. *Lien of garnishment destroyed by decree of insolvency.*—If the defendant in a pending suit dies, and his estate is regularly declared insolvent, before the rendition of judgment, the lien acquired by the previous service of a garnishment is thereby destroyed, and no judgment can be rendered against the garnishee. (BYRD, J., dissenting.)—*McEachin v. Reid*..... 410

JUDGMENTS, AND DECREES.

1. *Judgment by default after plea filed.*—A judgment by default, in an action on a promissory note, will be reversed on error, when the record shows that a plea of *non est factum*, duly verified by affidavit, was on file.—*McCoy v. Harrell, Nichols & Co.*..... 232
2. *Judgment for costs on abatement.*—On the abatement of an action by the death of the defendant, where no revivor is allowed by statute, judgment for costs can not be rendered against the plaintiff, for the use of the officers of court and witnesses: section 2389 of the Code applies only to cases in which there is a failure to revive through negligence.—*Garrison v. Burden*..... 513
3. *Void judgment vacated at subsequent term.*—An order reviving an action which has abated, and which can not be revived, is void for want of jurisdiction, and may be set aside at a subsequent term.—*S. C.*..... 513

JUDGMENTS, AND DECREES—CONTINUED.

4. *Amendment of judgment by correction of clerical misprision.*—When a judgment for costs, against an administrator, is improperly rendered to be levied *de bonis intestatis*, instead of *de bonis propriis*, the error is a mere clerical misprision, which will be therefore considered as amended.—*Hicks v. Barrett*..... 291
5. *Amendment of judgment nunc pro tunc.*—When a decree is rendered *nunc pro tunc*, as on final settlement of a guardian's accounts, which recites that "it appeared to the satisfaction of the court, from the records of the court, and from the papers on file relating to the settlement", &c., while the contents of the records and papers are not set out, the appellate court will presume that they authorized the decree which was rendered.—*Whitten and Wife v. Graves*..... 578
6. *Amendment of order of sale, nunc pro tunc.*—An order for the sale of a decedent's lands for equitable division among the heirs, like any other judgment or decree, can only be amended at a subsequent term, *nunc pro tunc*, when the amendment is authorized by some matter of record, or *quasi* of record.—*Summersett v. Summersett's Adm'r*..... 596
7. *Conclusiveness of probate decree.*—A decree of the probate court, rendered on final settlement of an administrator's accounts, can not be set aside, at a subsequent term, on account of matters which go behind it.—*Griffin v. Griffin*..... 296
8. *Same.*—A decree of the probate court, rendered on final settlement of an administrator's accounts and vouchers, is conclusive until reversed; and if the administrator is also the guardian of the sole distributee of the estate, he can not be charged, in a subsequent settlement of his accounts as guardian, with the value of assets which were not accounted for on his settlement as administrator, although the other distributee appears in open court, and releases all his interest to the said minor.—*Modawell v. Holmes*..... 392
9. *Construction and validity of decree on final settlement of guardian's accounts.*—When a decree of the probate court, rendered on final settlement of a guardian's accounts, shows on its face that the guardian has delivered to the ward's husband all the property which came to his hands, its validity is not affected by an additional order that he retain the balance found due him "out of any assets in his hands"; such order has no other force or effect than a certificate of the balance due him.—*Whitten and Wife v. Graves*.. 578
10. *Validity of order of sale of decedent's realty.*—An order for the sale of a decedent's realty in this case, founded on a petition which alleged that a sale was necessary for the purpose of making an equitable division among the parties interested, held void under the provisions of the act approved February 7, 1854, entitled "An act to regulate the sale of real and personal property by executors and administrators."—(Session Acts, 1853-4, p. 55).—*Johnson v. Johnson's Adm'r*..... 247
11. *Void order of sale set aside.*—The probate court has power, and it is its duty, on a proper application being made, to set aside

JUDGMENTS, AND DECREES—CONTINUED.

- and vacate, at any time, an order for the sale of a decedent's real estate, which is void on its face, or shown to be void by the matters of record connected with it.—*S. C.*..... 247
 Also, *Summersett v. Summersett*..... 596

JURISDICTION.

1. *Of probate court to allot exempt property.*—Under the general grant of jurisdiction “for orphans’ business,” the probate court has the authority, under a petition filed by the members of a decedent’s family, to allot to them the personal property to which they are entitled under section 1738 of the Code—*Turner’s Adm’r v. Whitten*..... 530
2. *Of supreme court.*—The supreme court has no jurisdiction, in the first instance, to issue an order to the clerk of the circuit court, requiring him to supersede a writ of restitution, in a case in which an appeal has been taken from the judgment of the circuit court: if the clerk refuses to perform his duty, application must first be made to the circuit court.—*Ex parte Floyd*..... 116
3. *Incompetency of presiding judge; selection of attorney to preside.*—When the presiding judge is incompetent to sit in a cause, and an attorney of the court is appointed, by consent of parties, to preside in his stead, (Code, § 640,) the record must affirmatively show that the person so appointed is an attorney of the court. *Horton v. Pool*..... 629

JURORS AND JURY.

See CRIMINAL LAW, 1, 2, 3.

CHARGE OF COURT.

LEGACY AND DEVISE.

1. *Bequest to “heirs,” with limitation over in event of death “without leaving lawful issue.”*—Under a devise and bequest of property “to be equally divided among my heirs,” “and in the event of the death of either, without leaving lawful issue,” his portion “to be equally divided among the surviving heirs,” the limitation over is not too remote.—*Bethea’s Executor v. Smith*..... 415
2. *Assent to legacy.*—Where property is devised and bequeathed by a testator, to ‘be equally divided among his heirs’, ‘and in the event of the death of either, without leaving lawful issue, that his portion shall revert to, and become a portion of the estate, and be equally divided among the surviving heirs’, the executor’s assent to the legacy to the first taker enures to the benefit of the persons who are to take under the limitation over; and on the happening of the first specified contingency, the legal title passes directly to them, and does not revert to the estate.—*S. C.*..... 415

LIBEL AND SLANDER.

1. *Evidence in aggravation of damages.*—In proving words which are not alleged in the complaint, and which can only be admissible in aggravation of damages, the plaintiff cannot prove the sense in which such words were understood by the hearers, or “the

LIBEL AND SLANDER—CONTINUED.

- impression made on their minds" by such words, unless the case falls within the principle stated in *Robinson v. Drummond*.—*Bullard and Wife v. Lambert*..... 204
2. *Admissibility of plaintiff's declarations, as tending to show want of chastity*.—The declarations of the female plaintiff, in an altercation between herself and her husband, in reference to her mother-in-law's statements concerning her unchaste conduct as reported and imputed to her by the alleged slanderous words, are competent evidence for the defendant, under the plea of justification, as bearing on the question of her chastity and modesty.—*S. C.*..... 204
3. *Proof of character; cross-examination*.—Where a witness, who testifies that the character of the female plaintiff "is good", states on cross-examination, "that he never heard anything against her until some time after her marriage, *except what he heard took place between her and S*", on a specified occasion, to which the defendant's evidence related, there is no error in refusing to exclude the italicized words.—*S. C.*..... 204

LIEN.

See GARNISHMENT.

LIMITATIONS, STATUTE OF.

1. *In action for forcible entry and detainer*.—The statute of limitations of three years, if available as a defense to an action for a forcible entry and detainer, must be taken advantage of by plea, and is not good matter for demurrer to the complaint.—*Ferguson v. Carter*..... 607

LUNATICS.

1. *Non compos mentis guardian; settlement of accounts of*—If a guardian becomes *non compos mentis* without having settled his accounts, the probate court may compel or allow a settlement of his accounts by his guardian; the proceedings being conducted in the name of the *non compos* guardian, by his guardian, and the decree for any balance found against him being rendered against him individually, to be levied of his goods and chattels in the hands of his guardian.—*Modawell v. Holmes*..... 392

NEW TRIAL.

See REHEARING AT LAW.

OVERRULED CASES.

1. *Steele v. McTyer's Adm'r*, 31 Ala. 667, overruled by *Boon & Co. v. Steamboat Belfast*..... 184

PARDON.

See CRIMINAL LAW, 9, 10.

PARTNERSHIP.

1. *Deed executed by partner in partnership name.*—A deed, or other instrument under seal, executed by one partner in the partnership name, if subsequently ratified by the other partner, is binding on both from its date; and such subsequent ratification may be by parol, and may be proved by parol.—*Gunter v. Williams and Wife*..... 561
2. *Rights of partnership creditor.*—A partnership creditor has no lien on the partnership property or assets which he can enforce at law, except by obtaining a judgment and execution; and he has, it seems, no lien in equity.—*Mayer v. Clark*..... 259
3. *Dissolution of partnership by consent, and transfer of joint property between partners.*—On the dissolution of a partnership by consent, it is competent for the partners to agree that the joint property shall belong to one of them individually; and such contract, if made in good faith, and for a valuable consideration, transfers the entire interest in the partnership property, free from the claims of the partnership creditors.—*S. C.*..... 259

PAYMENT.

See VENDOR AND PURCHASER, 5.

PHYSICIANS.

1. *Physician's diploma; proof of.*—A diploma, granted by any medical college in the United States, is legal evidence of the right of the person to whom it is granted to practice medicine and surgery, (Code, § 977: Session Acts, 1859–60, p. 20,) without proof of the incorporation of the college by which it was granted; and the loss of the diploma being shown, secondary evidence of its contents may be received.—*Halliday v. Butt*..... 178
2. *Same.*—The loss of a physician's diploma being shown, the testimony of an officer of the medical college by which it was granted would be competent proof of its grant; but the contents of an order on the records of the college, showing the grant of the diploma, must be proved by an examined copy, and not by the parol testimony of one of the officers.—*S. C.*..... 178
3. *Original entries on physician's books; admissibility and proof.*—In an action to recover for medical services rendered by plaintiff as a physician, section 2298 of the Code makes the original entries on his books "evidence for him that the services were rendered", unless their correctness is denied on oath by the defendant in open court; but such entries must nevertheless be identified by competent testimony, and cannot be proved by the plaintiff's own oath.—*S. C.*..... 178
4. *Same.*—In such case, preliminary proof of the identity of the entries must first be made to the court; and if the court decides that they are, *prima facie*, admissible, they must then go to the jury as evidence, unless the defendant denies their truth in the mode prescribed by the statute. Proof of hand-writing, it seems, is, *prima facie*, sufficient proof of identity.—*S. C.*..... 178

PLEADING AND PRACTICE.

I. PARTIES.

1. *Who is proper party plaintiff.*—An action of detinue for a slave, who was settled by a decree in chancery, under the provisions of the act of 1846, on a trustee, for the "sole and separate use and support" of a married woman, "and for the support and maintenance of her family"; and who, after the death of her husband, and her subsequent marriage, went into the possession of her second husband,—should be brought in the name of the trustee, and not in the name of the second husband.—*Parish's Adm'r v. Balkum*..... 285
2. *Same.*—A petition, filed in the probate court, in the name of the husband alone, asking the correction of alleged errors in the final settlement of the accounts and vouchers of his wife's late guardian, is demurrable on account of the non-joinder of the wife. *Whitten and Wife v. Graves*..... 578

II. COMPLAINT.

3. *On promissory note, by assignee against maker.*—In an action on a promissory note, by an assignee against the maker, the complaint must aver the assignment, or contain some other averment showing the plaintiff's ownership of the note; and the want of such an averment is a substantial defect, (Code, § 2405,) for which a judgment by default will be reversed on error. (BYRD, J., *dissenting.*)—*Douglas v. Beasley*..... 142
4. *In action against wife, for debt contracted before marriage.*—Under the provisions of the Code, (§ 1981,) the wife is liable for a debt contracted by her before marriage, as if she still were unmarried; and in declaring against her on such debt, it is not necessary to aver that she has a separate estate.—*Zachary v. Cadenhead*..... 236
5. *In assumpsit, for breach of special contract.*—A complaint which alleges, that the plaintiff claims of the defendant \$4,000, "as damages for the breach of an agreement entered into by him" on a specified day, "by which he promised to make to plaintiff, on" &c., "good and legal titles to" a specified quantity of land, sold by him, as administrator, under an order of the probate court; "to secure the payment of the purchase-money of which said land, plaintiff executed his promissory note," which he afterwards paid on a specified day; "at which time, defendant covenanted, agreed, and promised, to make to plaintiff good and legal titles to said lands"; "that defendant wholly neglected, failed and refused to execute to him titles to said land," but did, "in part performance of his said agreement," execute a deed for a part of the land, "and wholly failed and refused to make titles and execute a deed for the whole number of acres which he had covenanted, promised, and agreed to do"; "by reason of which breach of his agreement, plaintiff has been greatly injured and damaged, and an action has thereby accrued to him to have and demand the said sum above demanded; yet said defendant, although often requested so to do, has not as yet made titles to the whole number of acres by him agreed and covenanted and promised

PLEADING AND PRACTICE—CONTINUED.

- to be made by him," &c.,—is in assumpsit, and not in covenant.
Carter v. Beck..... 599
6. *In forcible entry and unlawful detainer*.—A complaint which alleges that, on a specified day, the plaintiff "was lawfully seized and possessed" of certain premises, and that, "being so seized, on the day aforesaid, the defendant did enter on and take possession of said premises, although notified by plaintiff not to enter," does not show a cause of action, either for a forcible entry, or for an unlawful detainer.—*Ferguson v. Carter*..... 607
7. *Same*.—A complaint which alleges that, on a specified day, "plaintiff was lawfully seized and actually possessed of" certain premises, and that defendant, "while said plaintiff was lawfully seized and in actual possession of said premises, with force and strong hand entered upon said premises unlawfully, and, after demand of possession thereof, detained, and does still detain the same, with force and arms,"—is good and sufficient.—*S. C.*..... 607

III. DEMURRER.

8. *Specification of causes of*.—A demurrer which does not specify any particular grounds of objection, as required by section 2253 of the Code, should be overruled; and this rule applies to proceedings against a defaulting witness in a criminal case.—*Pomeroy v. The State*..... 63
9. *Same*.—When a demurrer has been sustained by the primary court, the appellate court will presume, unless the record affirmatively shows the contrary, that causes of demurrer were specified as required by the statute, (Code, § 2253,) and, if the pleading to which the demurrer was sustained is defective, will presume that the demurrer was sustained on account of that defect.—*Whitten and Wife v. Graves*..... 578
10. *What may be reached by*.—The statute of limitations of three years, if available as a defense to an action for a forcible entry and detainer, must be taken advantage of by plea, and is not good matter for demurrer to the complaint.—*Ferguson v. Carter*.. 607

IV. PLEAS.

11. *Verification of plea of non est factum*.—A plea which states, in its body, that "the defendant, for answer to the complaint," saith that he did not sign the note sued on, &c., "and he makes oath that this plea is true;" and which is shown by the record to have been sworn to before the clerk, appears with sufficient certainty to have been verified by the oath of the defendant, although it is signed by his attorneys, and not by himself.—*McCoy v. Harrell, Nichols & Co.*..... 232
12. *Plea denying plaintiff's ownership*.—The rule of practice adopted at the January term, 1853, which provides, that, in an action "by any transferee, assignee, or endorsee, the plaintiff shall not be required to prove his interest in the cause of action, unless the same is put in issue by plea verified by affidavit," does not change any rule of evidence, nor relieve the plaintiff, when such sworn

PLEADING AND PRACTICE—CONTINUED.

- plea is filed, from the necessity of proving his cause of action as before.—*Jarrell v. Lillie*..... 271
13. *Plea of naturalization*.—The record of the naturalization of an alien as a citizen is not required to show affirmatively the existence of all the legal pre-requisites; nor is it necessary that a plea of naturalization, in answer to an information, should show more than the judgment or record.—*The State v. Harley*..... 689
14. *Plea of pardon*.—If the prisoner in a criminal case, after pleading pardon, pleads not guilty, and goes to trial on the latter plea without objection, and the jury return a verdict of guilty against him, it is not error for the court to give judgment for the costs against him.—*Michael v. The State*..... 361
15. "*Overruling plea of nul tiel record; when exception is necessary*." A recital in the judgment-entry, that the plea of *nul tiel record*, to a *sci. fa.* against a defaulting witness, "was overruled," means that the issue on the plea was tried, and decided adversely to the defendant; and the appellate court can not revise such decision, unless the evidence on which it was made is presented by bill of exceptions.—*Pomeroy v. The State*..... 63

PROHIBITION.

1. *Lies when*.—The writ of prohibition being an extraordinary remedy, to be resorted to only when there is no other remedy, and to be issued at the discretion of the court, it will not be awarded to the circuit court, at the instance of a stranger to a suit there pending, to vacate a rule for contempt against him on account of his interference with the property in controversy.—*Ex parte Stickney*..... 160

REHEARING AT LAW.

1. *Sufficiency of petition*.—A defendant in an action at law, upon whom process was served in September, 1862, and against whom a judgment by default was rendered in February, 1866, cannot obtain a re-hearing or new trial under the statute, (Code, § 2408,) by averring in his petition that he "was conscripted" on the same day the summons was served; that the process was executed by a special deputy of the sheriff, who did not inform him of his authority; that, knowing the officer was not a regular deputy, and not being informed of his special appointment, "he believed it to be a trick of the plaintiff's to scare something out of him"; that "he labored under the belief that, before anything further could be done, some other notice would have to be given"; that, but for this mistake and inadvertence on his part, he would have appeared and defended the action, to which he had a good defense; and that "there was a general belief among the people of the county, in which he participated, that the judicial and ministerial acts of those in office during the war would be held void and of no effect." These averments do not show accident, surprise, mistake of fact, or fraud, nor negative fault and negligence on his own part.—*Dothard. v. Teague*..... 583

REHEARING AT LAW—CONTINUED.

2. *Amendment of petition.*—There is no statute, or rule of practice, which prohibits an amendment, by leave of the court, of a petition for a re-hearing or new trial, after final judgment at law, (Code, § 2408;) consequently, an amendment may be allowed, after a demurrer has been sustained to the original petition.—*S. C.*..... 583
3. *Appeal.*—By the long and unquestioned practice of this court, an appeal lies from a judgment granting a rehearing or new trial (Code, §§ 2408, *et seq.*) after final judgment.—*S. C.*..... 583

REMOVAL OF SUITS INTO FEDERAL COURT.

1. *Under judiciary act of 1789.*—The 12th section of the judiciary act of 1789, which makes provision for the transfer of a cause, from the State court in which it originated, into “the next circuit court [of the United States] to be held in the district where the suit is pending,” does not authorize the transfer of such cause into the Federal district court, although that court exercises some of the powers of a circuit court; consequently, where the application asks the removal of a cause into “the next circuit court of the United States to be held for the district where said suit is pending, to-wit, the middle district of the State of Alabama,” and is accompanied by an offer of good security for the defendant’s personal appearance “in the circuit court of the United States to be held for the middle district of the State of Alabama,” the application is properly refused. (BYRD, J., *dissenting*, held the application sufficient.).. *Ex parte Groom* 731
2. *Under act of 1866.*—To authorize the removal of a pending suit from the State court, in which it originated, into the Federal court of the district, under the provisions of the act of congress approved July 27, 1866, (Acts of 39th Congress, p. 306,) it must be shown that the suit “is one in which there can be a final determination of the controversy, so far as it concerns” the defendant applying for the removal, “without the presence of the other defendants as parties in the cause”; consequently, where the action is in tort against several defendants for a conspiracy, there can be no removal. (BYRD, J., *dissenting*.)—*Ex parte Andrews & Mott*..... 639
2. *Under act of 1867.*—To authorize the removal of such suit under the provisions of the act of congress approved March 2, 1867, (Acts of 39th Congress, p. 558,) all the defendants must be non-residents of the State in which the suit is instituted.—*S. C.*..... 639

SCIRE FACIAS.

1. *Nature of proceeding.*—A *scire facias* on a forfeited recognizance in a criminal case, is a civil suit, and not a criminal proceeding. *Hatch v. The State*..... 718
2. *Sufficiency of sci. fa.*—In proceedings on a forfeited recognizance, it is not necessary that the notice, or *scire facias*, should be in exact or literal conformity with the form given in section 704 of the Penal Code; and the fact that it is directed to “any sheriff of

SCIRE FACIAS—CONTINUED.

- the State", commanding him to notify the defendants, instead of being directed to the defendants themselves, does not render it invalid or insufficient.—*Grund v. The State*..... 709
3. *Same*.—In a *scire facias* against a defaulting witness in a criminal case, when its sufficiency is first assailed on error or appeal, it is only necessary that a substantial cause of action should be shown (Code, § 2405); and in considering the question of its substantial sufficiency, the appellate court will not indulge in presumptions against the pleader, nor construe ambiguous averments as on demurrer: if the judgment *nisi*, as copied into the *scire facias*, recites that the witness had been duly subpoenaed, in a case in which the State was plaintiff, this recital will be held sufficient to show that he was summoned in a criminal case, and that he was bound to appear at the term at which the forfeiture against him was taken.—*Pomeroy v. State*..... 63

SHERIFF.

1. *Liability as trespasser ab initio*.—A sheriff who levies an attachment on a horse, and, after keeping him twenty-one days, sells him at public auction, without an order of court, the week before the commencement of the term to which the attachment was returnable; the sale being made on the ground that "the charge of keeping the property is very great," (Code, § 2529,) and ten days' notice of it being given,—is not liable as a trespasser *ab initio*, either on account of the sale under such circumstances, or on account of his failure to sell at an earlier day.—*Griel v. Hunter*..... 542
2. *Same; premature commencement of action*.—In trespass against a sheriff, for levying an attachment against plaintiff's vendor on a horse which was in plaintiff's possession under his alleged purchase, a recovery can not be had against the defendant, as a trespasser *ab initio*, on account of an irregular or illegal sale under the process after the commencement of the action, unless the evidence warrants the conclusion that he intended from the first to abuse his lawful authority.—*S. C.*..... 542

SLANDER.

See LIBEL AND SLANDER.

SLAVES AND FREEDMEN.

1. *Hiring of slave; loss of services*.—In the absence of an express stipulation in a contract for the hiring of a slave, the hirer must bear all losses which occur during the term, except those which are caused by the act or conduct of the owner.—*Leslie v. Langham's Executors*..... 524
2. *President Lincoln's emancipation proclamation of January, 1863*. Prior to May, 1865, whether Alabama was in or out of the Union, the emancipation proclamation issued by the president of the United States in January, 1863, had no force here.—*S. C.*..... 524
3. *Abolition of slavery by act of war*.—Slavery was destroyed in Alabama by the act of war, prior to the passage of the ordinance of

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the State convention on the 22d September, 1865.— <i>S. C.</i>	524
Also, <i>Bill Miller v. The State</i>	54
<i>Logan v. The State</i>	733
4. <i>General criminal statutes applicable to freedmen.</i> —For offenses committed between the 20th July, 1865, (when the provisional governor issued a proclamation, declaring the civil and criminal laws of the State, “as they stood on the 11th day of January, 1861, except that portion which relates to slavery, to be in full force and operation”,) and the 22d September, 1865, (when an ordinance was passed by the convention, by which slavery was declared to be abolished and prohibited,) freedmen are amenable to the general criminal statutes applicable to other persons.— <i>Stephen v. The State</i>	67
Also, <i>Bill Miller v. The State</i>	54
<i>Tempe v. The State</i>	360

“STAMP ACT.”

1. *Constitutionality of act of congress requiring stamp on process of State courts.*—Congress has not the constitutional power to impose a tax on the process or proceedings of the State courts; consequently, the act of congress approved June 30, 1864, providing for the internal revenue of the government, so far as it requires a stamp to be affixed on legal process issuing from the State courts, is unconstitutional and void. (BYRD, J., holding that said act did not apply to process issued from the State courts.) *Smith v. Short*..... 385
2. *Construction of said act.*—If congress has the constitutional power to tax the judicial process of the State courts, the act which requires an internal-revenue stamp “upon writs or other original process, by which any suit is commenced in any court of record”, (13 U. S. Statutes at large, 110,) nevertheless does not apply to a petition filed in the probate court, asking the revocation of the probate of a will.—*Sowell v. Sowell's Adm'r*..... 243
3. *Stamp on promissory note.*—Under the United States “stamp act” of 1863, (U. S. Statutes at large, 39th congress, 143,) it is not necessary that an internal-revenue stamp should be affixed to a promissory note executed in a foreign country, and payable generally, in order to make it admissible in evidence; and if it was executed at any place within the United States, at which no collection district was at that time established, a stamp might be affixed to it, by “any party having an interest therein”, at any time prior to the 1st January, 1867; and in the latter case, the cancellation of the stamp is not necessary.—*Blunt v. Bates*..... 470
4. *Who may affix stamp to note.*—An attorney, at-law, in whose hands a note is placed for collection, has such an interest therein by virtue of his general authority, as authorizes him to affix an internal revenue stamp to the note, when necessary to protect the interests of his client; and such act on his part will be presumed to have been authorized, until repudiated by his client.—*S. C.*..... 479

"STAY LAW."

1. *Constitutionality of act of Feb. 20, 1866, as impairing the obligation of contracts, and delaying justice.*—The first and eighth sections of the act approved February 20, 1866, entitled "An act to regulate judicial proceedings", (commonly known as the "stay law",) which postpone the rendition of judgment at least twelve months, are not, in their operation on pre-existing contracts, violative of the constitutional provision against laws impairing the obligation of contracts, nor of the fourteenth section of the bill of rights, which declares that "all courts shall be open", and that right and justice shall "be administered without sale, denial, or delay"; but the second, third, and fourth sections, which prevent the collection of judgments under execution, are unconstitutional and void. (WALKER, C. J., *dissenting* on the first point, held the whole law unconstitutional and void.)—*Ex parte Pollard & Woods* 77
2. *Same, as affected by constitutional provisions as to title, subject-matter, and form.*—The provision of the fifth section of said act, which prohibits sales by mortgagees without actual possession of the property, not being in any sense a regulation of judicial proceedings, is violative of the second section of the fourth article of the constitution, which requires that the subject-matter of the act "shall be distinctly stated in the title"; but the unconstitutionality of this section does not affect the validity of the other provisions of the act, which are appropriately described in the title nor is said act, though in effect amendatory of other laws, violative of that provision of said second section of the fourth article of the constitution, which requires that "the law or section revised or amended shall itself be set forth at full length" in the amendatory act.—*S. C.*..... 77
3. *Same, not applicable to suits in chancery.*—Suits in chancery are not within the provisions of the first section of the act approved February 20, 1866, entitled "An act to regulate judicial proceedings."—*Ex parte Hewitt*..... 300
4. *Nor to statutory award.*—An arbitration is not a suit, within the provisions of the act approved February 20, 1866, entitled "An act to regulate judicial proceedings"; consequently, that act does not prevent the rendition of a judgment on motion on an award, at the first term after the award is made.—*Crook v. Chambers*.... 239

TAXES.

1. *Constitutionality of State law taxing imported liquors.*—The State has no right to impose a tax for revenue on liquors imported from foreign countries, so long as they remain in the hands of the original importer, and in the original casks or barrels in which they were imported; but the restriction on the State's right to tax ceases, when the original casks are broken by him; and it does not extend to liquors brought here from other States in the Union. (BYRD, J., *dissenting* as to the last proposition.)—*Hinson v. Lott*.. 123
2. *County tax on imported liquors.*—Since the 73d section of the revenue law, approved February 22, 1866, authorizes the assessment of a tax for county purposes on the amount "shown by the assess-

TAXES—CONTINUED.

ment books," and the tax on imported liquors is not entered on "the assessment books", the commissioners' court has no authority to levy a county tax on such imported liquors.—*S. C.* 123

TRESPASS.

See SHERIFF.

TRIAL OF RIGHT OF PROPERTY.

1. *Admissibility of claim bond, attachment, and levy, as evidence for plaintiff.*—In a statutory trial of the right of property, between a plaintiff in attachment and a claimant who deduces title from the defendant in attachment, there is no error in admitting the claim bond, in which the levy and claim are recited, "as evidence to prove the levy"; nor in the admission of the attachment and its levy, as evidence for the plaintiff.—*Mayer v. Clark*..... 259
2. *Admissibility of evidence identifying goods levied on, and showing consideration of plaintiff's debt.*—In such action, though it may be unnecessary for the plaintiff in attachment to prove the identity of the property levied on, the admission of such evidence, at his instance, is not erroneous; nor is there any error in permitting him to prove the notes on which his suit is founded, or their consideration.—*S. C.*..... 259

TRUSTS.

1. *Continuance of trustee's title.*—Where a bill in chancery is filed under the provisions of the act approved February 14, 1846, entitled, "An act to protect the rights of married women"; and a decree is therein rendered, by which the wife's distributive interest in a decedent's estate is settled upon a trustee, "for her sole and separate use and support, and for the support and maintenance of her family"; the trust does not terminate on the death of the husband, but continues during the life of the wife.—*Parish's Adm'r v. Balkum*..... 285
2. *Termination of trust by death of husband.*—On the death of the husband, the wife's statutory separate estate is discharged of the trust, and the legal title vests absolutely in her; consequently, she may sue at law for its recovery, and cannot sue in equity without showing some independent ground of equitable relief.—*Dent v. Slough*..... 518

VENDOR AND PURCHASER.

1. *Notice implied from possession.*—A purchaser of land which is in the possession of a third person, without inquiry into the nature and character of that possession, is chargeable with notice of all the equitable rights which are binding on his vendor.—*Phillips v. Costley*..... 486
2. *Vendor's lien paramount to widow's dower.*—Where the purchaser gives his notes, without security, for the agreed price of the land, and the vendor conveys the title to him by deed, the vendor's lien on the land for the unpaid purchase-money is superior to the right of dower on the part of the purchaser's widow.—*Brooks v. Woods*..... 538

VENDOR AND PURCHASER—CONTINUED.

3. *Vendor's lien, and assignment thereof.*—A vendor's lien for the unpaid purchase-money of land, which is but an incident to the debt, passes to an assignee of the purchaser's note, in the absence of a stipulation to the contrary; but, if the vendor exchanges the purchaser's note, for the note of a remote sub-purchaser, which is also secured by a vendor's lien on the land, although that lien passes to him by the transfer, he can not set it up against the party from whom he received it, in defense of a bill for the reformation of his bond for title, and the specific performance of his original contract, but must become the actor in a separate proceeding.—*Day v. Preskett*..... 624
4. *Same.*—A writing is not necessary to constitute a valid assignment of a debt for the unpaid purchase-money of land, or to make it effectual as an equitable assignment of the vendor's lien; and where the title remains in the vendor, the lien passes to the assignee with the debt, unless it is waived upon some consideration valid in law, or by some act operating by way of estoppel: neither the fact that the assignee accepted the transfer of the debt on the faith of the purchaser's promise to pay it in a short time, nor the fact that the purchaser's note was delivered up to him at the time of the transfer, nor these two facts combined, are sufficient to show such waiver.—*Magruder v. Campbell*..... 611
5. *Extinguishment of debt and vendor's lien.*—If the vendor, by subsequent agreement with the purchaser, surrenders the note given for the purchase-money, and accepts in exchange for it the note of a sub-purchaser, his debt on the original purchaser is thereby extinguished, and with it the accompanying vendor's lien.—*Dennis v. Williams*..... 633
6. *Tender of deed to purchaser, as necessary to perfect right to foreclose vendor's lien.*—When the purchaser's note contains a stipulation, that it is not to be due and payable until titles to the land have been made to him, a tender of such title, or some valid excuse for the failure to make such tender, is indispensable to the equity of a bill which seeks to enforce the vendor's lien; and such tender in the bill, unaccompanied by a valid excuse for the failure to make it before filing the bill, is not sufficient.—*S.C.*..... 633
7. *Acceptance of deed annuls agreement to convey.*—The acceptance by the purchaser of a deed from his vendor, is a complete execution of the vendor's antecedent agreement to convey, and annuls it; and an action at law cannot afterwards be maintained upon the agreement, on account of the deficiency in the land conveyed by the deed.—*Carter v. Beck*..... 599
8. *Construction of deed as to quantity of land conveyed.*—A deed, executed by an administrator, to the purchaser at a public sale made by him under an order of the probate court, which describes the several parcels composing the tract of land by the numbers of the section and township, stating the number of acres contained in each, and adding the words "*containing in all about*" a specified number of acres, which number is greater than the aggregate of the sums said to be contained in the several parcels:

VENDOR AND PURCHASER—CONTINUED.

- "which said land," it states, "was knocked off to B. for the sum of \$24,457.10,"—shows a sale of the land in gross, and contains no covenant as to quantity.—*S. C.*..... 599
9. *Retention of possession by vendor of chattel.*—The retention of possession by the vendor of a chattel, if unexplained, is *prima-facie* evidence of fraud; but, if explained, and shown to be consistent with good faith, the title passes by the contract notwithstanding such retention of possession.—*Mayer v. Clark.*..... 259
10. *Title of purchaser at sheriff's sale, as affected by adverse possession.* Where the defendant in execution has the legal title, or a complete equitable title, the title passes by the sheriff's deed to the purchaser, notwithstanding the adverse possession of a third person at the time; but the purchaser can not, during the continuance of such adverse possession, convey his title by deed to another; yet, if the defendant in execution has the legal title at the time of the sale, and the adverse possessor induces a third person to buy from the purchaser at the sale, by verbally promising to waive his claims, and to surrender the possession, the adverse possessor can not set up against such sub-purchaser, in an action at law, either his adverse possession, or any title which he then held, and which he acquired subsequent to the sheriff's sale, and from any other person than the purchaser at that sale.—*David v. Shepard.*..... 587

WILLS.

1. *Probate of will without notice to heirs and distributees.*—When a will has been admitted to probate, without notice to the parties who are by law entitled to notice, the probate will be set aside on their timely application.—*Sowell v. Sowell's Adm'r.*..... 243
2. *Parties to petition to set aside probate.*—It is not necessary in such case, though it is the better practice, that the petition should state who all the parties in interest are; but the record must show that they were all notified of the application.—*S. C.*..... 243
3. *Probate of nuncupative will.*—A decree of the probate court, in these words: "The nuncupative will of W. K., deceased, having been duly proved by the oaths of J. B. C., A. P. B., and J. W. W., the subscribing witnesses thereto, the same is adjudged and decreed to be filed and recorded", is a sufficient and valid probate of the will, if it be a will.—*Kirby v. Kirby's Adm'r.*..... 492
4. *Same.*—The mode of making probate of nuncupative wills, prescribed by statute in this State, is the only form authorized by law, and is, in effect, probate in "solemn form," or "form of law," as distinguished from probate in "common form."—*S. C.*..... 492
5. *Notice of probate.*—By the settled practice in this State, if a will is admitted to probate without notice to the persons who are by law entitled to notice, the probate will be revoked on their application; but, under the statute which was in force in 1847, (Clay's Digest, 597, § 3,) non-resident distributees or heirs-at-law were not entitled to notice of the probate of a nuncupative will, and, therefore, could not have the probate revoked on account of the want of notice.—*S. C.*..... 492

WILLS—CONTINUED.

6. *Construction of will, as to discretionary powers of executor and rights of widow on her second marriage.*—Where a testator directed that the greater part of his estate should be held and retained by his executor, for the use and support of his wife and children, until his youngest daughter attained the age of sixteen years, and should then be sold, and the proceeds divided equally among his wife and children; that, in the event of the second marriage of his wife before his youngest daughter attained the age of sixteen years, the property should be sold, rented, or hired out, as his executor might think most beneficial to the interest of his wife and children; and that his wife should, in either case, receive a child's part,—*held*, that the purpose for which the estate was to be retained by the executor, and the widow's right to the use of the property in common with the children, ceased on her second marriage; and that the discretionary power of the executor to rent or hire out the property, after that event, did not continue for a longer period than was necessary, under all the circumstances of the case, to bring the estate to a final settlement.—*Worley v. High's Adm'r*..... 171

WITNESS.

1. *Competency of vendor or mortgagor, as witness for purchaser or mortgagee.*—Where lands are mortgaged by a debtor for the indemnity of his surety, and are afterwards found to be subject to a former vendor's lien; and the mortgagee, having paid the debt, files a bill in equity against the mortgagor's immediate vendor, to recover damages for a breach of the covenants of warranty running with the land,—the mortgagor, not being bound by any covenants or warranty, is not a necessary party to the bill, and is a competent witness for the mortgagee.—*Gunter v. Williams and Wife*..... 561
2. *Competency of witness as affected by interest.*—Where a bill seeks to enforce an outstanding vendor's lien on land, which has passed into the hands of a sub-purchaser at administrator's sale under an order of the probate court, the heirs-at-law of the deceased purchaser and the sub-purchaser being joined as defendants, a distributee and heir-at-law of the deceased purchaser is a competent witness for the plaintiff, although his testimony tends to increase the assets of the estate.—*Magruder v. Campbell*..... 611
3. *Putting witnesses under rule.*—Where the witnesses for the prosecution, in a criminal case, are put under the rule, and one of them nevertheless remains in court during the examination of another, it is discretionary with the court to permit him to be examined; and the exercise of that discretion is not revisable on error.—*Montgomery v. The State*..... 683
4. *To what witness may testify.*—The supposition of a witness, as to the whereabouts of another person at a particular time, is not competent evidence.—*Hall v. The State*..... 698
5. *Examination of witness as to matters tending to criminate or degrade him.*—A witness is not bound to answer questions as to matters

WITNESS—CONTINUED.

- which may criminate him; but this rule does not extend to matters which only tend to degrade or bring shame on him.—*S. C.*... 698
6. *Cross-examination of.*—On the cross-examination of a witness, for the purpose of testing his correctness, fairness, or credibility, much must be left to the enlightened discretion of the presiding judge.—*S. C.*..... 698
7. *Same; proof of character.*—Where a witness, who testifies that the character of the female plaintiff "is good," states on cross-examination, "that he never heard anything against her until some time after her marriage, *except what he heard took place between her and S.*", on a specified occasion, to which the defendant's evidence related, there is no error in refusing to exclude the italicized words.—*Bullard and Wife v. Lambert.*..... 204
8. *Impeaching witness on cross-examination.*—A witness can not be questioned, on cross-examination, about irrelevant matters affecting his general credit, for the purpose of contradicting and impeaching him; *secus*, as to matters which affect his credit in the particular case, as by showing hostility towards the party against whom he is introduced.—*S. C.*..... 204
9. *Same.*—When a witness testifies, on his direct examination, that he is acquainted with the character of another witness, and that he would not believe said witness on oath, it is permissible to show on cross-examination that he does not understand what is meant by character, and does not use the word in its proper legal signification.—*S. C.*..... 204
10. *Sci. fa. against.*—In a *sci. fa.* against a defaulting witness in a criminal case, when its sufficiency is first assailed on error or appeal, it is only necessary that a substantial cause of action should be shown (Code, § 2405); and in considering the question of its substantial sufficiency, the appellate court will not indulge in presumptions against the pleader, nor construe ambiguous averments as on demurrer: if the judgment *nisi*, as copied into the *sci. fa.*, recites that the witness had been duly subpoenaed, in a case in which the State was plaintiff, this recital will be held sufficient to show that he was summoned in a criminal case, and that he was bound to appear at the term at which the forfeiture against him was taken.—*Pomeroy v. State.*..... 63
11. *Demurrer to sci. fa.*—The statute which requires a specification of the grounds of demurrer, (Code, § 2253,) applies to a *scire facias* against a defaulting witness in a criminal case.—*S. C.*..... 63

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